

Technical Committee on

“Land Tenure and Development”

Formalising land rights in developing countries

Moving from past controversies to future strategies



March 2015

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Layout: H  l  ne Gay (Gret)*

*Printed by XL-Print & Mailing, March 2015
Printed on recycled paper.*

CITATION REFERENCE: 'Land Tenure and Development' Technical Committee, 2015,
*Formalising Land rights in developing countries: moving from past controversies to future
strategies*, Paris, Minist  re des Affaires   trang  res et du D  veloppement international (Maedi),
Agence fran  aise de d  veloppement (AFD), 82 p.

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PREFACE

Land is a key issue on today's global development agenda. This is particularly true for Africa. Large-scale land acquisitions by foreign investors, high demographic growth, rapid urbanisation, urban planning, rural development and access to employment (especially in the agricultural sector) are among the factors accelerating the pace of change in land governance.

Longstanding systems of customary rights continue to function in most countries, alongside statutory laws that give the State control over huge swathes of land and restrict private ownership to a minority of the population. This not only hinders the exercise of both types of rights, but can also lead to conflict and the large-scale land grabbing that is causing considerable concern for the future of agriculture on this continent.

The last three decades have seen numerous attempts to improve the articulation between customary and statutory land regulations, with many interventions by French development actors working on pilot projects.

Now the time has come for a change of scale. If this is to happen, many States will need to reform their land legislation and change their policies in order to formalise and secure peoples' rights to access, occupy and use land productively.

The success of these policies will depend upon the right choices being made.

In May 2012 the international community adopted the Voluntary Guidelines on Responsible Governance of Land Tenure Regimes proposed by the FAO Committee on World Food Security. Having supported the adoption of this important text, France is now encouraging efforts to establish mechanisms to facilitate its application and improve the transparency of land transactions.

As part of these efforts, all French development actors should support policies that aim to secure historic land rights, which are mainly held by rural families and communities and those living in the outskirts of urban areas. This is the main focus of AFD's strategic intervention on food security in Africa.

Policies to formalise rights have decisive impacts on the future opportunities of different rights holders: most notably on women's land rights, young farmers' ability to set up, city dwellers' access to building plots and even the most modest housing, pastoral mobility, and the conservation of natural resources that provide economic and ecological services for the whole population.

However, formalising rights does not necessarily lead to security of tenure. Care needs to be taken to ensure that formalisation processes are not over-simplistic or used to serve particular interest groups, so that existing inequalities are not entrenched or exacerbated, and new ones are not created. Reducing inequality should be a central feature of all sustainable development policies.

This is why the 'Land Tenure and Development' Technical Committee undertook this valuable work on the conditions for successful land rights formalisation processes. The starting

points for this reflective exercise, which was conducted under the auspices of French MOFA and AFD, are the positions set out in the White Paper on land policies, *Land Governance and Security of Tenure in Developing Countries* (2009) and the paper on *Large-scale land appropriations. Analysis of the phenomenon and proposed guidelines for future action* (2010).

This present document analyses the conditions in which policies to formalise land rights can foster inclusive economic development, encourage investment, maintain social peace and encourage citizen participation by both rural and urban populations. Recognising and valuing local practices and land rights is an important aspect of these conditions.

I am sure that the decision makers and practitioners for whom this paper was written will find it most enlightening. I also hope that it will inform the application of the Voluntary Guidelines on land management policies and contribute to genuinely sustainable agricultural policies.

Throughout history land has affected the way that individuals relate to each other and been the basis of the State's relationship with its citizens. Therefore, we should be under no illusion about the fact that it is a highly political issue. ●

Annick Girardin

*Minister of State for Development and Francophonie,
Ministry of Foreign Affairs and International Development*

ACRONYMS AND ABBREVIATIONS

AFD	French Development Agency
ALR	Agrarian and Land Reform (Burkina Faso)
APFR	Attestation de possession foncière (Rural land certificates in Burkina Faso)
CCFV	Commission de conciliation foncière villageoise (Village land conciliation commissions in Burkina Faso)
CNCR	Conseil national de concertation et de coopération des ruraux (Umbrella organisation for Senegalese farmer and producer federations in Senegal)
CNSFMR	Comité national de sécurisation foncière en milieu rural (the National Committee for Rural Land Tenure Security in Burkina Faso)
Cofa	Commission foncière (Land commission in Niger)
Cofob	Commission foncière de base (Community-based land commission in Niger)
Congad	Council of non-governmental development organisations
Fepab	Burkina Federation of Agricultural Producers
franc CFA	Franc of the African financial community
GDP	Gross Domestic Product
GIS	Geographic information system
GOANA	Grande offensive agricole pour la nourriture et l'abondance (Great Agricultural Offensive for Food and Abundance in Senegal)
GPS	Global Positioning System
LIS	Land information system
LLOP	Local land occupancy plan
LRIC	Land resource information centre (Madagascar)
LUP	Land use plan
Maedi	French Ministry of Foreign Affairs and International Development
MONRE	Ministry of Natural Resources and Environment
PACR	Rural communities support programme (Senegal)
PDRG	Master plan for integrated development of the left bank of the River Senegal
PNSFMR	National rural land security policy (Burkina Faso)
Reva	Return to agriculture
RLS	Rural land services
RLUP	Rural land use plan
SAED	Senegal River Delta Development and Exploitation Company
ULR	Urban land register
WAEMU	West African Economic and Monetary Union
Zapa	Zone agropastorale à priorité agricole (Agro-pastoral area prioritised for agricultural use in Senegal)
Zape	Zone agropastorale à priorité élevage (Agro-pastoral area prioritised for pastoral use in Senegal)
ZP	Zone exclusivement pastorale (Area exclusively reserved for pastoral use in Senegal)

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ACKNOWLEDGEMENTS

The two main editors were Philippe Lavigne Delville (IRD) and Aurore Mansion (Gret), who drew on contributions to seminars held in December 2013, the synthesis prepared by Alain Durand-Lasserve (CNRS) and ongoing experience in several countries, which are summarised in boxes prepared by members of the Committee and its network: Amel Benkahla (Gret), Florence Bron (Maedi), Perrine Burnod (Cirad), Christian Castellanet (Gret, Mekong Regional Land Governance Project), Jean-Pierre Chauveau (IRD), Jean-Philippe Colin (IRD), Joseph Comby (Etudes foncières), Patrick D'Aquino (Cirad), Claire Galpin (Géomètres sans frontières and Fief), Lauriane Gay (Université Montpellier I, Laboratoire ART-Dev), Peter Hochet (Laboratoire Citoyennetés, Burkina Faso), Philippe Karpe (Cirad), Mathias Koffi (PTD/Sofreco), Georges Kouamé (Université Félix Houphouët Boigny, Côte d'Ivoire), Jean-Pierre Jacob (IHEID), Eric Léonard (IRD), Etienne Le Roy, Jean-Philippe Lestang (FIT Conseil), André Marty, Marie Mellac (CNRS), Andrianirina Ratsialonana Rivo (Madagascar Land Observatory), Zo Ravelomanantsoa (Madagascar National Land Programme), Hector Robles Berlanga (University of Mexico), Saïdou Sanou (Odec, Burkina Faso), Sidy Mohamed Seck (Université Gaston Berger de Saint-Louis, Senegal) and Daniel Thiéba (Grefco, Burkina Faso).

Other written and oral contributions were provided by Céline Allaverdian (Gret), Ward Anseeuw (Cirad), Vincent Basserie (Uemoa), Pierre-Yves Bertrand (Maedi), Mathieu Boche (Maedi), Emmanuèle Bouquet (Cirad), Laurence Boutinot (Cirad), Cécile Broutin (Gret), Aurélie Chevrillon (AFD), Gérard Chouquer (Fief), Lorenzo Cotula (IIED), Eric Denis (CNRS), Moussa Djiré (Gersda, Mali), Véronique Dorner (LAJP), Céline Fabre (Maaf), Abdoulaye Harissou (CSN), Marylise Hébrard (CSN), Ced Hesse (IIED), Alain Durand Lasserve (CNRS), Pierre-Yves Le Meur (IRD), Dominique Lorentz (CSN), Isabelle Manimben (CCFD-Terre solidaire), Paul Mathieu, Marie Lan Nguyen Leroy, Didier Nourissat (CSN), Hubert Ouedraogo (African Union), Vatché Papazian (AFD), Emilie Pèlerin (Maedi), Jérôme Pennec (Maedi), Caroline Plançon (Maedi – World Bank), Emily Polak (IIED), Mamy Rakotondrainibé (Collectif Tany), Alain Rochegude (LAJP), Harris Selod (World Bank), André Teyssier (World Bank), José Tissier (AFD), Camilla Toulmin (IIED) and Jean-François Tribillon (ACT-Consultant).

The final text was presented and validated at a conference held on 15th December 2014, which was attended by the Committee's European and African partners. The Committee would like to thank all participants for their valuable contributions, particularly Jean-Ousmane Camara (Land reform coordination unit – Madagascar), Daouda Diarra (Permanent Secretariat for implementation of the LOA, Mali), Abdoulaye Dieye (National Commission for Land Reform – Senegal), El Hadj Faye (National Land Reform Commission – Senegal), Eric Raparison (Sif – Madagascar), Mariam Senou (Ministry for Rural Development, Mali), Moustapha Sourang (National Commission for Land Reform – Senegal) and Mariam Sow (Enda Pronat – Senegal).

This document reflects the position and opinions of the Technical Committee. It does not represent the institutions from which its members are drawn, and does not necessarily reflect the views of the French Government.

A French version of this paper can be found online at: www.foncier-developpement.fr ●

EXECUTIVE SUMMARY

Formalising rights involves giving written and legal form to undocumented land rights that are not yet recognised by the law. These are often called 'informal' rights, although it would be more accurate to describe them as 'extra-legal'. This land policy option is widely promoted by international bodies, often presented as an obvious, almost inevitable step, and sometimes as a panacea that will increase investment, encourage economic development, improve poor people's security and social integration, prevent conflicts and ensure social harmony.

Following the validation of the Voluntary Guidelines on Responsible Governance of Land Tenure Regimes by the Committee on World Food Security, the French Ministry of Foreign Affairs and International Development and the French Development Agency asked the 'Land Tenure and Development' Technical Committee to work with its country partners on a critical assessment of 30 years' experience with policies and programmes to formalise land rights. The objective was to provide land policy actors and their partners with insights into the conditions for effective, inclusive and sustainable processes to formalise rights, and complementary options that could contribute to successful reforms.

This exercise showed that standard formalisation policies (huge systematic operations that focus solely on private and/or individual property rights) pose a number of problems. They do not take account of collective rights, and therefore lead to exclusion, where land is appropriated through family or lineage landholdings or common property. Standard approaches tend to involve complex and costly procedures that are beyond the reach of most local people. Their quantitative objectives are inconsistent with the discernment and flexibility needed to address the social and highly political issues associated with land, and run the risk of creating exclusion and further conflict. Many land administrations cannot either absorb all the extra work generated by formalisation procedures or manage registered parcels in a transparent, effective and sustainable way. And formalisation can add to the confusion if, as is often the case, it is of little interest to local people and not they do not register changes in the status of their land. As a result, information systems soon become out of date and lose their value as an effective land management tool.

There are alternative procedures that try to recognise the diversity of existing rights and plurality of norms for accessing land and its resources by promoting new legal categories which are closer to local forms of land and resource appropriation. They use changing technologies that different kinds of actor can deploy to discuss, defend and manage their rights, some of them highly sophisticated and some simplified (mapping, information systems, etc.). These procedures seek to build a form of land governance that encourages cooperation between the central administration, local governments and customary authorities, and is conducive to

more inclusive and transparent land management. Finally, they aim to put in place formalisation mechanisms that are more affordable and accessible for local people.

Although these alternative procedures have certainly led to progress, much still needs to be done on several fronts as they require new skills that are not always available at the local level. There is not always much demand for legal documents, even adapted ones, especially when they are still relatively expensive. Some approaches still have a 'proprietary' bias; and registering changes and updating land information remains problematic. Rather than seeking to formalise rights to plots of land, it might be more effective to focus on reliable mechanisms for formalising transactions, and institutionalising local procedures to make them more rigorous and give them legal validity. The land administration would then gradually become stronger as more changes are registered.

Specific conditions are needed to create a virtuous circle of formalisation and development. These conditions are rarely in place initially, and it must be possible to establish them to avoid formalisation operations leading to more arbitrary appropriations, confusion and conflict. There is no mechanical link between formalising land rights, security of tenure, economic development and social peace. Security of tenure is not the only lever for economic development: in many countries the main problems lie in the economic environment, access to markets, price relations, access to inputs and technologies, etc. Formalising rights is also only one dimension of land policies: regulating private investments in land and tackling inequality are also crucial aspects of these policies that raise equally pressing economic and social questions.

Formalising land rights should not be regarded as a panacea, or as having any intrinsic virtue: it may lead to inclusion or exclusion, and reduce or contribute to conflict. It also sends a strong political signal, as formalisation changes relations between the State, local communities and individuals. Pursuing a policy to formalise land rights and deciding how this will be done are weighty decisions that should be widely and publicly debated. It is by nature a societal choice, and a matter of national sovereignty.

While there is no 'magic formula' or universally replicable model for the process, there are six key elements that can together contribute to successful, inclusive and sustainable formalisation policies:

1. **Reconciling legality and legitimacy** through clear legal recognition of existing acknowledged rights, whatever their origin (customary or statutory) or nature (individual or collective, temporary or permanent).
2. **Widespread debate on the social projects that the land policies will serve**, the opportunities for formalisation, how it will be implemented and its possible alternatives.
3. **Building consensus between all the actors concerned** (central and local governments, the land administration, civil society groups, professionals in the sector, customary authorities), and sustaining the political will needed to implement formalisation procedures.
4. **Defining a realistic implementation strategy**, which recognises that the key issue is establishing effective and transparent governance and/or administration of land rights, and that this is a medium- or long-term process.
5. **Progressive implementation** that leaves room for learning, experimentation and adjustment.
6. **Ensuring from the outset that the land services will be financially viable**, and putting in place mechanisms to fund them.

This document draws on ongoing experiences in various countries to suggest how this can be done, by:

- > reducing legal inconsistencies and procedures that result in insecure tenure;
- > promoting in-depth debates on the opportunities for formalisation, informing these discussions with solid empirical analysis, mobilizing different groups of stakeholders and enabling civil society actors to understand the issues, formulate their positions and participate meaningfully in the debates;
- > broadening the options for securing tenure so that they meet the needs of different users and territories: formalising transactions and assigned rights (informal documents), formalising uses and management rules, using land tax as a means of funding the process and securing tenure;
- > establishing relevant legal statuses and articulating them in a coherent legal and administrative framework;
- > putting in place management mechanisms based on intermediate levels of governance (decentralisation) and providing opportunities to work with the different bodies and authorities that already exist at the local level (subsidiarity);
- > avoiding the risks of standardisation by putting in place flexible and open mechanisms to manage rights, which allow the actors responsible for their implementation to take account of local specificities and different forms of organisation;
- > addressing the need for reliable and effective mechanisms by providing initial training and support to enable the actors involved in land management to learn from past and present experiences, adapt procedures to deal with problems encountered during the process, and put in place monitoring and control mechanisms;
- > adopting a progressive approach to policy extension, and documenting implementation in order to inform the direction of reforms. ●

Introduction

Developing countries are facing new challenges as demographic growth intensifies the pressure on land throughout their territory. Population densities are increasingly concentrated around urban areas, where there are insufficient jobs to provide full employment;¹ and natural resources (especially water) are becoming increasingly scarce due to worsening climatic crises. Large-scale land appropriations are undermining local people's rights to resources, compromising both their individual means of subsistence and national food security. Problems with governance lead to political crises and sometimes to violence, destabilising what may be already a fragile socio-political situation. Finding effective solutions to these pressing and complex problems will involve ambitious public policies that address a range of interrelated issues at several levels and in various sectors.

Land policies are a key element of these public policies. They have huge political, economic and social implications because they define the way that people relate to each other around land and natural resources. They may be inclusive or exclusive, make access to land, housing and natural resources more flexible or more rigid, and help consolidate peace or exacerbate tension and conflict. Land policies have long been a source of exclusion rather than inclusion. Now, as land inequalities increase, it is more important than ever for governments to take concerted action to balance the complex and often potentially explosive mix of land-related matters in their countries.

The former colonial authorities left many developing countries with a dual system in which some plots of land are covered by title deeds and others are not (between 40% to 90% of the land, depending on the country and continent concerned). Many countries have started to formalise land rights in accordance with the recommendations of various international bodies, documenting and legally recognising so-called 'informal' land rights, which would be more accurately described as 'extra-legal'.²

Formalisation is not a new option. Back in the 1980s individual private title deeds were promoted as the best way of making economic actors more secure, protecting them from arbitrary state interventions and enabling them to invest in their land. This idea was then widely criticised as being of limited use, and since the 1990s thinking on formalising land rights has broadened in order to take greater account of the diversity of local rights to land and renewable resources.

Formalising land rights seems to have become an almost ubiquitous process, regardless of whether the prevailing purpose is proactive (stimulating productivity) or reactive (protect-

1. For a detailed analysis of the factors that influence contemporary land issues, see in particular Durand-Lasserve A. and Le Roy E, 2012, *La situation foncière en Afrique à l'horizon 2050*, Collection À Savoir n°11, African Development Bank, African Development Fund, AFD, 155 p.

2. Local land rights, especially in rural areas, should not always be negatively compared with statutory rights, as they represent other ways of organising the appropriation of land and resources, and are based on norms that predate written law and are partly outside it, hence the term 'extra-legal'.

ing local people).³ It is sometimes regarded as a panacea that can not only lift people out of insecure and informal tenure, but also resolve conflicts, stimulate investment and encourage economic growth. Yet formalisation policies have had very mixed results in both urban and rural areas: they are rarely implemented nationwide, few land information systems are kept up to date, huge operations to formalise land rights can contribute to exclusion, especially when they are exclusively based on private ownership, and the economic benefits of formalisation often fall short of expectation.

Our aim here is not to question the underlying principle of formalising land rights or deny the importance of inclusive land policies, but to contribute to the debate on land policies and the role that formalisation should play in them. What is needed is collective reflection on the conditions for appropriate, successful formalisation and its possible alternatives in contexts characterised by a plurality of norms⁴ and weak institutions.

This document is part of ongoing international, continental and regional initiatives to provide conceptual and operational frameworks that will contribute to successful land policy reforms. It is intended to supplement and enrich existing recommendations, particularly the 'Voluntary Guidelines on Responsible Governance of Land Tenure Regimes' adopted by the Committee on World Food Security on 11 May 2012, and the African Union 'Land Policy Guidelines' adopted at the Conference of Ministers of Agriculture in April 2009.

By drawing on the lessons learned from over 30 years' experience in formalising land rights in various countries and the findings of numerous research works, we hope to help land policy actors in developing countries and their partners better understand the issues involved in formalising land rights, look beyond the controversies that all too often cloud the debate, and tailor their actions to the different contexts concerned. The four main chapters of this paper discuss:

- > the objectives and methodology of the reflection process, and the target audience for this paper;
- > the societal issues raised by formalisation policies and their role in State-building processes. This chapter provides a brief historical overview, showing how land policies reflect societal choices and are central to relations between individuals, social groups and the State;
- > what policies to formalise land rights can be expected to achieve, and in what conditions. This chapter explains why these policies cannot be regarded as a panacea, explores the diversity of procedures, gives a detailed assessment of various policies and proposes other possible options;
- > some of the conditions for successful formalisation policies that support inclusive economic and social development. This chapter shows the importance of multi-stakeholder debates, sets out some key principles for organising such debates, and makes several suggestions as to how better account can be taken of the diversity of land situations. ●

3. Chauveau J.-P., 2013, 'Les leçons de l'histoire. Les politiques de formalisation des droits 'coutumiers' en Afrique subsaharienne depuis la période coloniale', Land Tenure and Development Technical Committee one-day seminars on *Formalising rights and responsibilities*, Nogent-sur-Marne, 18 p.

4. The notion of a plurality of norms reflects the co-existence of different, more or less contradictory, registers of norms. This is true in every society, but especially in countries where there is great social diversity and where local societies have retained a certain autonomy. See Lund, C., 2001 'Les réformes foncières dans un contexte de pluralisme juridique et institutionnel: Burkina Faso et Niger', in Winter G., ed. *Inégalités et politiques publiques en Afrique, pluralité des normes et jeux d'acteurs*, Paris, Karthala, pp. 195-208.

CHAPTER 1

Why do we need to think about policies to formalise land rights in developing countries?

The disputed value of formalising land rights

Many different 'developing' countries share a common colonial legacy of legal dualism: part of their territory is covered by land rights that are defined and framed by statutory law (State or public land administered by the state services),⁵ while a significant proportion of both the rural and urban population occupy, inhabit and use land to which they have no legally recognised rights, or only insecure tenure.

For many years this situation was not regarded as particularly problematic, even if it did encourage abuses of power. Then, structural adjustment policies started promoting the formalisation of land rights (giving them written and legal form) as a condition for economic development, and sometimes as a way of resolving this legal duality. World Bank research on land programmes in Thailand in the 1980s supported this view,⁶ leading to a proliferation of formalisation programmes that aimed to unify rights by promoting private individual titles.

These programmes were increasingly called into question in the 1990s, especially (but not exclusively) in terms of their value for rural areas. Criticisms levelled against them included the fact that they were expensive, rapidly became redundant, had limited and sometimes even negative economic impacts, and were often used to further processes of exclusion, land grabbing and the privatisation of common resources, such as pastures. Land registers were rarely updated and therefore failed to reflect the realities on the ground, causing confusion and conflict and helping perpetuate opacity and corruption.

From replacement to adaptation. And back again?

This prompted many observers to abandon the principle that economic and social development can only be achieved by replacing local land rights with private individual titles, and

5. A very small proportion in most African and Asian countries, and a larger proportion in Latin America.

6. Feder G. and Nishio A., 1998, 'The benefits of land registration and titling: Economic and social perspectives', *Land Use Policy*, vol. 15 n° 1, pp. 25-43. Feder G. and Onchan T., 1987, 'Land ownership security and farm investment in Thailand', *American Journal of Agricultural Economics*, vol. 69 n° 2, pp. 311-320. According to Bromley, these studies suffered from methodological bias. Bromley D. W., 2009, 'Formalising property relations in the developing world: the wrong prescription for the wrong malady', *Land Use Policy*, vol. 26 n° 1, pp. 20-27.

to promote policies that encouraged and supported the adaptation of local rights instead.⁷ There were many attempts to implement this ‘adaptation paradigm’, using various procedures, methods and tools to put in place or strengthen local land management institutions and to document, map and legally formalise individual and collective rights. One important lesson that emerged from these initiatives is that formalising land rights (through documented legal recognition) should not be confused with securing land rights (ensuring that they can be exercised peacefully without threat or hindrance), although each process is supposed to contribute to the other. The body of experience and research that has now been established enables us to better identify the issues, advantages and difficulties associated with this desire to formalise diverse and constantly evolving local land rights.

While one might think that there would be general agreement on the adaptation paradigm, the 2000s saw another wave of policies systematically to formalise and privatise rights – this time legitimised by technological developments, the hypothesis that formalising rights can reduce poverty,⁸ and pressure on land from private investments. Previous criticisms and nuances seem to have been forgotten and the standard discourse is now a quasi-hegemony.

Analysing different approaches in order to clarify the debate and inform strategies

This resurgence of standard procedures and the frequent confusion between securing and formalising rights prompted the ‘Land Tenure and Development’ Technical Committee to start thinking specifically about formalising land rights in 2012. The aim was to provide land policy actors and their partners with a detailed assessment of the different existing approaches and their relevance, outcomes and conditions for success, especially in contexts characterised by a plurality of norms, gaps in the land administration and an unreliable economic environment.⁹

This process of collective reflection was led by the Ministry of Foreign Affairs and International Development (Maedi) and the French Development Agency (AFD), facilitated by Alain Durand-Lasserve (geographer and researcher emeritus at CNRS) with support from Gret.¹⁰ Committee members spent several months working on the intellectual content (preparing a guidance paper setting out the terms of the debate,¹¹ examining about 30 detailed case studies¹² and more crosscutting assessments from different viewpoints and disciplinary

7. See in particular Bruce J. W., 1992, *From replacement to adaptation: a shift of paradigm*, Madison, Land Tenure Center, and Bruce J. W. and Migot-Adholla S. E. ed., 1994, *Searching for land tenure security in Africa*, Kendall/Hunt Publishing Company.

8. De Soto H., 2000, *The mystery of capital: Why capitalism succeeds in the West and fails everywhere else*. New York: Basic Books.

9. This is a continuation of previous work by the ‘Land Tenure and Development’ Technical Committee, particularly the *White Paper on Land Policies, Land Governance and Security of Tenure in Developing Countries*, 2009, Paris, AFD/Ministry of Foreign and European Affairs, and *Large-scale land appropriation and responsible agricultural investment*, 2010.

10. Gret has been responsible for the technical and scientific secretariat of the Committee since its inception in 1996.

11. Durand-Lasserve A., 2013, *La formalisation des droits fonciers: objectifs, résultats, limites et alternatives. Regards croisés sur l’Afrique subsaharienne*, framework document on ‘Formalising rights and responsibilities’, ‘Land Tenure and Development’ Technical Committee, Maedi, AFD, Paris.

12. From South Africa, Burkina Faso, Cameroon, China, Côte d’Ivoire, Ghana, Haiti, Kenya, Madagascar, Mali, Mexico, Rwanda, Senegal, Tanzania and Vietnam.

angles¹³), engaging in broader debates with the network (organising study and feedback days¹⁴) and synthesising their conclusions.¹⁵

This very wide-ranging collective process considered all the so-called ‘developing’ countries and the problems they face in both rural and urban areas. There were some presentations on urban issues and situations in China, Vietnam, Mexico and other countries, but the vast majority of contributions focused on rural and African settings. As a result, this document is mainly but not exclusively concerned with African and rural situations. But this does not mean that these are the only settings characterised by a plurality of norms, informal arrangements or a weak State setup; ineffective formalisation policies and out-of-date land information systems also exist in rural and urban areas in countries with strong administrative capacities. There is no ‘uniquely African’ aspect to the debate about formalising rights, just variable configurations in terms of the State’s links with its citizens, the plurality of norms and the economic and institutional environment.

Land-related problems in urban areas differ from those in rural areas,¹⁶ in terms of land values, access to housing, market pressure, the issues raised by developing and servicing neighbourhoods, the position of tenants, concepts of co-ownership, access to basic services and infrastructures, etc. Land regimes differ too: private ownership is generally widespread, the land administration is more present and the land market more highly developed. In addition to this, the rights assigned by many projects to regularise shanty towns are conditional rights, and peri-urban developments have to manage the transition between rural and urban spaces. Nevertheless, urban areas are also characterised by informal situations, a continuum of rights and different local regulatory mechanisms, and are just as likely to struggle with out-of-date land registers or weak links between title and investment. Other issues include the spatial diversity of land problems, the specific needs of the poor in securing land tenure, and the administration’s capacity to manage a much larger volume of titles in a transparent and accountable manner. The analyses presented in this paper can help clarify these aspects of the debate on formalising land rights in urban areas. ●

13. Disciplinary, sectoral, professional, etc.

14. At AFD, Maedi and the World Bank.

15. Durand-Lasserve A., 2014, *Formalisation des droits et des obligations. Synthèse des conclusions des journées d’études*, ‘Land Tenure and Development’ Technical Committee, Maedi, AFD, Paris.

16. Durand-Lasserve A. and Royston L., 2002, *Holding their ground: Secure land tenure for the urban poor in developing countries*, Earthscan/James & James. Durand-Lasserve A., Durand-Lasserve M. and Selod H., 2013, *A Systemic Analysis of Land Markets and Land Institutions in West African Cities: Rules and Practices. The case of Bamako, Mali*, Policy Research Working Paper n° WPS6687, Washington, World Bank, 60 p.

CHAPTER 2

Primarily a political issue

Land policies reflect a vision of society and support the State apparatus

Many so-called ‘developing’ countries are characterised by their great social diversity and varying forms of land appropriation. They differ in the ways that land is used, the strength of the State’s hold over society, the relative autonomy with which different elements of local societies operate within the national territory, the way that these societies regard individual and joint family or ‘community’ affairs, and how they manage the tension between competition and solidarity. In rural areas in particular, land is regulated by the local political authorities, whose legitimacy flows from various sources, many of them historical or customary. These local norms ensure social integration, but also often codify the unequal status of different groups, such as indigenous individuals and migrants or men and women.

PLURALITY OF NORMS, INSTITUTIONS AND RIGHTS

All societies are shaped by a range of norms and rights, albeit to differing degrees. For example, in France statutory law imposes numerous restrictions on private property rights, which are qualified by various obligations defined by the State or the commune (joint ownership, third party rights, town planning laws, etc.). They are only one possible example of ‘property rights’,^I where the same person can concurrently hold a whole set of ‘basic rights’.^{II} This plurality is particularly marked in developing countries whose colonial past left them with statutory laws that define the norms and recognise the rights enjoyed by local people. Local societies retain a certain autonomy over varying amounts of national land, which is regulated by social norms of customary origin. Socially sanctioned activities on the land and its resources vary according to the way that the area was settled, and are organised in ‘bundles of rights’.^{III} [cont.]

I. In the English sense of the term of various rights of possession or title, rather than private property (*ownership*).

II. The right to alienate, transfer, include and exclude, manage, develop, cultivate and remove.

III. The notion of a ‘bundle of rights’ relates to the fact that rights holders (individuals or social groups) hold a varied set of operational rights (to access, remove, cultivate, develop, etc.) and administrative rights (internal management, inclusion/exclusion, transmission, alienation, etc.). Benda-Beckmann F. v. and Benda-Beckmann K. v., 1999, ‘A Functional Analysis of Property Rights, with Special Reference to Indonesia’, in Van Meijl T., Van Meijl F. and Benda-Beckmann F. v., ed., *Property Rights and Economic Development. Land and Natural Resources in South-East Asia and Oceania*, London, Kegan Paul, pp. 15-56.

Rights holders are not limited to individuals, as family groups and village collectives can also hold rights of administration, removal, cultivation, etc. There is usually no clear separation between rights holders (even joint ones) and farmers or users.

Although it is often criticised, this plurality is not necessarily a problem if users are clear about the hierarchy of norms and rights, if legal categories can accommodate them, and the authorities are able to arbitrate disputes. One of the issues in land reforms is the relationship between local norms and statutory law, and between the State and the local authorities. Does the national legislation recognise local norms and rights? Does it recognise the functions of the actors who play a role in regulating local land matters? Is the objective of land reforms to suppress this plurality by seeking to impose standard norms and rights, or to accommodate it by incorporating local rights into statutory law and framing the interactions between state and local regulations? ■

In determining the rights that are legally recognised and the ways that they are managed, land policies reflect a vision of the relations between individuals, social groups and the State, and thus a conception of society and a (positive or negative) view of the social diversity and socio-economic inequalities within that society. By recognising certain types of rights, land policies favour those who hold these rights and marginalise or exclude those who do not. They also define management mechanisms and procedures that can weaken or even exclude actors who will not be able to access or follow them.

Depending on the country and the period concerned, land policies have variously recognised, tolerated, ignored or overturned local norms for land appropriation and the authorities that regulate them. Local jurisdictions¹⁷ vary tremendously according to their context, coexisting and conjoining with statutory law through the interactions between local land governance bodies and the public administration. The way that the State deals with the different forms of appropriation used by its citizens is about more than access to existing rights: it also reflects the way that the State relates to local authorities and establishes a foothold at the local level. How it decides to do so and whether or not it recognises these norms will depend on a number of factors, including the country's colonial past.

Formalisation policies have history

The land policies that the colonial powers put in place in Latin America, Africa and Oceania were based on a State monopoly over land which ultimately resulted in the legal dualism that exists today. Much of the land that was privately appropriated by colonial actors and their patrons was obtained through State or privately sponsored violence. Although the level of force varied according to the country concerned, access to private property was usually reserved for colonial actors and the State, which variously abolished, recognised, protected or converted existing land rights into personal use rights in order to create different types of 'public land'. While ownership in Europe was created 'from the bottom up' through a process of historical change and very gradual formalisation, the colonial authorities used administrative

17. Forms of social norms and rights not covered by statutory law. Le Roy E., 2004, 'Éditorial. Le pluralisme juridique aujourd'hui ou l'enjeu de la juridicité', *Cahiers d'anthropologie du droit*, vol. 2003, pp. 7-17.

procedures to create ownership from 'the top down',¹⁸ and did not encourage its widespread dissemination across the countries they governed.

National land policies in newly independent countries have varied greatly according to the period and context concerned. In Latin America they have oscillated between privatisation (concentrating huge amounts of land in a few hands) and agrarian reforms, between defending rural communities and individualisation in the name of national citizenship. In Oceania, certain countries recognise the sovereignty of (neo)customary structures over at least some national lands, and have given them powers to regulate these lands. Governments in Southeast Asia have taken a more laissez-faire approach, apart from the socialist regimes that collectivised land (Vietnam); while African states have tended to use the colonial legacy to consolidate their elites and implement modernisation policies that accommodate the legal dualism and lack of formalised land rights.

COLONIAL CONCEPTS OF PROPERTY LIVE ON IN INDEPENDENT AFRICAN STATES¹

By and large, the land policies pursued by African governments have followed in the wake of colonial policies. Driven by political expediency rather than doctrinal conviction, they have swung from maintaining customary prerogatives on the one hand, in order to avoid the risk of alienating local authorities and leaders or causing social unrest by hurriedly introducing private property; while on the other maintaining the State's prerogative to manage unregistered customary lands, exclusive ownership of 'vacant and ownerless land', and hegemonic role in putting land to productive use in order to serve the interests of the people and development.

This ambiguous position has enabled them tacitly or officially to support both the rights acquired by migrants extending the frontiers of agricultural lands and expropriation measures that serve the interests of political elites or large agricultural development projects. Apart from these projects, they had little reason to support donors' proposals for programmes to register land rights systematically, which could limit the opportunities that State officials and political elites had given themselves through vote-catching policies, as they already had easy access to legal registration. ■

I. Box prepared by Jean-Pierre Chauveau (IRD).

Land and property policies are an important part of the state-building process, and are thus shaped by the configuration and political history of the country concerned. Yet a significant proportion, if not most of the land in developing countries still retains its informal status, even in Latin America, which is very different from other continents. Little or nothing is done to implement mechanisms to legally recognise and formalise land rights. The complex procedures for issuing rights, cumulative costs and possible arrangements that need to be made to get applications processed are all objective obstacles to formalisation; while those in the know play the system and benefit from 'perpetuating a state of confusion' in land man-

18. See in particular Comby J., 2011, *Création et sécurisation de la propriété en Europe*, 'Land Tenure and Development' Technical Committee Briefing Notes, MAE, AFD, Paris. See also Stamm V., 2013, 'Formaliser les pratiques coutumières. Europe médiévale, Afrique coloniale et contemporaine', *Études rurales*, vol. 191 n° 1, pp. 169-189.

agement.¹⁹ The scale of this informality, and the scarcity and failure of policies to formalise rights are not solely due to lack of resources. They are also the result of political choices and the prevalence of rent-seeking relations between the State or the administrative authorities and the general population.

Local people are not totally powerless in the face of these obstacles. They use a range of popular practices to secure their rights, and often document land transactions and temporary or permanent transfers of rights.²⁰ These practices coexist with and often complement legal provisions, but are rarely recognised by public policies. The fact that many States refuse to explicitly recognise and give them a legal framework makes them into partial solutions that favour the powerful and their ability to work the system.

However, the status quo has changed over the last 30 years as a result of pressure to implement large-scale programmes to formalise land rights – often through private titles. This pressure has mounted since the mid-2000s, with greater liberalisation of land markets and repeated attempts to unify them in a single legal framework, the promotion of individual private titles, the commodification of all means of access to land for housing, and growing pressure on land in both rural and urban areas. The contrast between the recent proliferation of programmes to formalise land rights and their frequent failure to deliver meaningful results²¹ raises questions about the objectives they serve, and the political will of elites that have long regarded them as worthless, or even profited from the confusion between formal and informal land management systems.

Multiple and sometimes contradictory aims

Policies to formalise land rights are not ends in themselves, but a means of achieving broader aims. Formalisation policies are designed and implemented in the name of many, sometimes contradictory objectives, from promoting economic development and alleviating poverty to establishing the rule of law, reducing conflicts, helping resolve political crises or promote gender equality, and helping build the State and establish full citizenship for the entire population.²² Promoting rapid economic development often goes hand in hand with 'proactive' formalisation policies that focus on private and individual ownership and use land markets to 'optimise' the allocation of land rights. Implicitly or explicitly, these policies can lead to the marginalisation of small producers who are regarded as ineffective, and run the risk of undermining their stated objective of combatting poverty.

19. Piermay J.-L., 1986, 'Le détournement d'espace: corruption et stratégie de détournement dans les pratiques foncières urbaines en Afrique centrale', *Politique africaine*, n° 21, pp. 22-36, and Mathieu P., 1996, 'Pratiques informelles, gestion de la confusion et invention du foncier en Afrique', in de Villers G., ed., *Phénomènes informels et dynamiques culturelles en Afrique*, Paris, Cédaf-L'Harmattan, pp. 64-87.

20. Erecting land markers, planting live hedges, etc., strengthening their position in local social networks (especially migrants), establishing nepotistic relationships with powerful political actors, seeking written documents or administrative papers regardless of their legal validity, using whatever public mechanisms are available and functional, etc. (Lavigne Delville P., 2007).

21. It is estimated that less than 10% (and even as little as 2%, according to certain sources) of rural land in the whole of sub-Saharan Africa has been officially registered. Furthermore, its recorded status may not be legally valid if land registers are not regularly updated.

22. Mamdani M., 2004, *Citoyen et sujet: l'Afrique contemporaine et l'héritage du colonialisme tardif*, Paris, Karthala.

USING THE SAME FORMALISATION MECHANISM FOR DIFFERENT DEVELOPMENT PROJECTS: REFLECTIONS ON THE EXAMPLE OF POST-SOCIALIST VIETNAM^I

Vietnam started implementing a redistributive agrarian reform at the beginning of the War of Independence in 1945, and introduced a policy to collectivise land several years later. The mid-1980s saw the progressive liberalisation of the economy, de-collectivisation of land and the introduction of State-controlled individual land tenure into the legal system. The State then launched huge campaigns to allocate rights to use agricultural and forest lands to individuals and households, which were recorded on certificates known as 'red books'.^{II}

In the first 15 years of implementation, this formalisation mechanism was accompanied by a process known as *Doi Moi*, which saw the country open up to the outside world and establish a market economy, partly based on agricultural development. The mechanism was framed to make land accumulation and concentration impossible, and to facilitate relatively egalitarian access to agricultural and forest lands. It was very popular and led to unprecedented economic growth and a rapid rise in the standard of living (over 4% of annual GDP per person in the 1990s), halving relative poverty between 1993 and 2003. It was not perfect, but did meet the expectations and liberal aspirations of the Southern Vietnamese and urban elites while remaining acceptable to party officials and rural households in the North emerging from 30 years of collectivisation and war.

In 2003 the government radically changed its development policy: having restarted the agricultural economy, Vietnam set itself the challenge of becoming an industrial country by 2020. In order to do this, the State enabled and encouraged the authorities to mobilize agricultural land for industrial and commercial development, created new rights to help activate and sell agricultural land, and allowed private companies and foreign operators to access land. Public reaction to the changes in land categories and the expropriations resulting from this policy was hostile and increasingly violent (demonstrations, conflicts^{III}), and the national growth rate seems to have slowed down.

As tensions were exacerbated by the food crisis of 2007-2008, the government launched a policy to support agriculture and rural areas and initiated a participatory process to review the land policy and promulgate a new constitution. However, the pace of legislative change has been extremely slow so far, despite the 6 million responses to this process – mostly criticising the expropriation of land to finance development projects run by the government and its elites. The mechanism for formalising rights has barely changed since the 1980s, apart from the fact that the process of distributing certificates has become faster (especially for forest lands) and is now computerised. ■

I. Box written by Marie Mellac (CNRS).

II. A World Bank study calculated that over 10 million certificates granting households and individuals the right to use agricultural land were issued before 2008, covering 80% of all cultivated agricultural parcels.

III. Between 2004 and 2006, the ministry responsible for land (Ministry of Natural Resources and Environment, MONRE) recorded a 58.5% increase in land-related conflicts.

In reality, formalisation policies may be used to serve very different purposes from their stated objectives. Land rights may be formalised in order to encourage the growth of agribusiness,²³ allow political and economic elites to control land, or start processes of market exclusion. Formalisation policies allow the State to strengthen its presence in rural areas and poor urban neighbourhoods because they change its relationship with the local authorities: incorporating land rights into statutory law and public regulations removes them (at least partially) from the local land authorities, and establishes a direct link between the State and its citizens in a space previously mediated by the local authorities. These changes raise questions about access to full national citizenship for rural populations and residents in peripheral urban areas, and about the relationship between national citizenship and membership of certain social groups: are they regarded as mutually exclusive, or should they be interconnected?²⁴

DOES ISSUING LAND TITLES OR CERTIFICATES CONTRIBUTE TO THE RULE OF LAW?

Although one of the main justifications for formalisation policies has been the role that property rights can play in economic development, formalisation has become increasingly separate from economic issues as it has moved up the international agenda. It is now often regarded as an end in itself, and has become part of another aspect of the liberalisation process – the rule of law. Strengthening the rule of law is an integral element of contemporary aid policies, both as part of the drive to strengthen democracy and protect citizens from the abuses of authoritarian States, and in order to encourage a market economy, which can only function in a stable institutional environment. Legal reforms are thus an integral element of land reforms that aim to establish the rule of law in order to support the market (the law and development movement!).

Formalising rights can be seen as part of efforts to establish the rule of law from another angle too: this time in terms of full citizenship, which is a necessary condition for ending the colonial and post-colonial dualism between citizens and subjects.¹¹ Although this was one of the drivers behind policies to formalise and individualise the land rights of indigenous communities in Latin America, this aspect is rarely mentioned in policy debates, and there is little grassroots demand for access to formalised rights. Furthermore, claiming full citizenship based on legal recognition of one's property rights raises questions about the relationship between national and 'local' citizenship (in the sense of belonging to local political communities), which is largely based on customary land relations. ■

I. Manji A., 2006, *The politics of land reform in Africa: from communal tenure to free markets*, London/New York, Zed Books.

II. Mamdani M., 2004, *Citoyen et sujet: l'Afrique contemporaine et l'héritage du colonialisme tardif*, Paris, Karthala.

23. Labzaé M., 2014, *Le grand remaniement. Investissements internationaux, formalisation des droits fonciers et déplacements contraints de populations dans l'Ouest éthiopien*, Cahiers du Pôle foncier n° 8, Montpellier, Pôle foncier, 30 p.

24. Hochet P., 2011, 'La terre, l'étranger et le citoyen. Des situations de citoyenneté associées à la terre', in Jul-Larsen E., Laurent P.-J., Le Meur P.-Y., et al, ed., *Une anthropologie entre pouvoirs et histoire. Conversations autour de l'œuvre de Jean-Pierre Chauveau*, Paris, Apad-IRD-Karthala, pp. 405-422.

Formalisation policies can be used as a tool to renegotiate the social contract in favour of small disadvantaged groups or to help large sections of the population. They can be powerful levers for change in existing socio-political balances and in rebuilding the State, but may also be used to maintain existing power relations, line the pockets of the powerful and secure political favours, or as political payback for certain social groups, especially when coupled with compulsory resettlement policies. This means that they can be very powerful tools in enabling States, elites, international firms and individual interests to take control of land. Inclusive policies that break away from colonial and post-colonial policies which led to social exclusion, and by contrast rebuild social contracts on a new basis, involve radically different choices from policy choices that serve the elite.

POLITICAL NEGOTIATIONS OVER A NEW SOCIAL CONTRACT CENTRE ON THE *MAILO-BIBANJA* SYSTEM IN BUGANDA^I

The traditional kingdom of Buganda lies in the heart of Uganda and occupies a strategic place in national politics, as its unique *mailo-bibanja* land system was central to the political negotiations of the 1990s. This system, which was introduced by the British colonial authorities in 1900 to help them better control the territory, led to the creation of a land register based on private property. Lands in the kingdom were distributed between the royal family, elite groups and clan leaders;^{II} those who occupied and cultivated *mailo* lands had no legally protected rights until a law was passed in 1928 giving them hereditary rights to occupy and use these lands productively, while maintaining the existing ownership rights to them. From 1900 onwards the *mailo-bibanja* system was closely linked with the political management of the kingdom, gradually becoming part of the Baganda identity, and remaining so even after it was abolished (on paper) in a decree issued by Idi Amin Dada in 1975.

After the National Resistance Movement came to power in 1986, President Museveni was reluctant to restore a land system that he regarded as having been crucial in maintaining the power and political influence of the elite and perpetuating inequalities in the kingdom. He wanted to standardise the existing land tenure system by generalising private ownership in favour of 'owner-occupiers' rather than the holders of *mailo* lands.^{III} This was part of a broader political project to weaken the elites in the kingdom, which put 'owner-occupiers' at the heart of the process of rebuilding the State. The government eventually abandoned this project due to strong opposition from the politically powerful *mailo* owners, and the *mailo-bibanja* system was restored in the Constitution of 1995.

The introduction of a formalisation policy in 1998 enabled 'owner-occupiers' to obtain certificates of occupancy confirming their land rights, making it harder to expel them illegally and enabling them to access credit. ■

I. Box prepared by Lauriane Gay (Université Montpellier I, attached to the Laboratoire ART-Dev).

II. West H., 1972, *Land Policy in Buganda*, Cambridge University Press.

III. Chalin V., 2014, *Les propriétés foncières au Buganda en Ouganda: le paradoxe du système mailo-bibanja sous le régime de Museveni. Une étude des pratiques locales et des identifications sociales en périphérie encore rurale de Kampala*, research co-funded by the 'Land tenure and Development' Technical Committee.

Implementing land rights formalisation policies is a very expensive process that involves a large number of intermediaries. This means that these policies may be seen as an end in themselves and a market opportunity for the national and international consultancy firms, land administrations and professionals that will be called upon to implement them. The donors, NGOs, private operators and other agencies concerned also develop their own vision of formalisation policies and choose the mechanisms that will be used to implement and support them. This exposes even the most carefully considered policies to errors of interpretation and slippage during implementation, and may lead to inconsistencies between their spirit and their practice.

Many factors can increase the gap between a policy's stated objectives and its practical application: contradictions between its explicit or implicit objectives, reformulations at various stages of implementation, discrepancies between institutional objectives and funding frameworks, the individual incentives facing the actors responsible for their implementation, and resistance to or hijacking of the policy and land operations. Sometimes the disconnect is so great that it obscures or undermines the aims of operations to register land rights. ●

CHAPTER 3

Policies to formalise land rights are not a panacea²⁵

They have many virtues, but in very specific conditions

Many virtues are ascribed to policies to formalise rights: it is said that they encourage inclusive economic development, stimulate investment, address the problem of legal dualism by legally recognising local practices and land rights, promote the use of written documents that stabilise agreements and protect actors' rights, combat abuses of power by the State and corruption in the land administration, and help people achieve full citizenship by putting in place accessible mechanisms to formalise rights, etc. These are all legitimate objectives, and formalising rights could theoretically contribute to them or even be an important element of them.

However, local demand for written documents varies greatly. When state mechanisms are inaccessible, people use all kinds of certificates and papers and make written records of their contracts and transactions. Prior action may need to be taken in other sectors in order to achieve the desired objectives of formalisation, particularly where the environment and state land services are concerned (agricultural and town planning policies, etc.). There is no intrinsic virtue in formalising land rights. Doing so only resolves the situation in certain conditions, and is only meaningful as part of a coherent set of development policies.

Legal documents can be a useful tool in securing land tenure in areas that are subject to market pressure, especially in urban areas. They can provide protection against the brutal enforcement of power relations and facilitate social integration – but only if they legalise socially validated rights, if there are reliable land management institutions in place, and if account is taken of the plurality of norms. In a favourable economic environment they can also facilitate access to credit, providing banking institutions exist and they agree to accept these documents as collateral.

And formalisation policies do not exist in isolation: they are part of the national political economy. Inclusive formalisation that serves the interests of the population will work against

25. This chapter summarises a huge body of literature on the topic, including: Platteau J.-P., 1996, 'The Evolutionary Theory of Land Rights as Applied to sub-Saharan Africa: A Critical Assessment', *Development and Change*, vol. 27 n° 1, pp. 29-86; Colin J.-P., Le Meur P.-Y. and Léonard E., ed., 2009, *Les politiques d'enregistrement des droits fonciers. Du cadre légal aux pratiques locales*, Paris, Karthala; Durand-Lasserve A. and Selod H., 2009, 'The Formalization of Urban Land Tenure in Developing Countries', in Lall et al., ed., *Urban Land Markets – Improving Land for Successful Urbanization*, Springer, Dordrecht, Netherlands; Bromley D. W., 2009, 'Formalising property relations in the developing world: the wrong prescription for the wrong malady', *Land Use Policy*, vol. 26 n° 1, pp. 20-27. See also Colin J.-P., 2013, 'La formalisation des droits fonciers: perspectives économiques', 'Land Tenure and Development' Technical Committee one-day seminars on *Formalising rights and responsibilities* Nogent-sur-Marne.

numerous economic interests, disrupt administrative routines and prevent many types of corruption. It is worth remembering that in many contexts the State is still the main source of its citizens' insecurity.

FORMS OF TENURE INSECURITY IN CONTINENTAL SOUTHEAST ASIA^I

Land has become a key political issue in the five countries of the Mekong Basin (Cambodia, Laos, Myanmar, Thailand and Vietnam). It is a particularly hot topic in Cambodia, where it was one of the opposition's central themes during the latest elections, and doubtless one of the main reasons why people voted for them. Land is also one of the main subjects of the ongoing debate and social mobilization in the run-up to the next elections in Myanmar. In Laos, timid moves to oppose forced expropriations were nipped in the bud by the expulsion of the representative of an international NGO that was deemed to be making too much of a stir and the suspicious disappearance in December 2012 of one of the main leaders of a civil society group.

Since 1984, countries in continental Southeast Asia have followed Thailand's example and launched a succession of huge titling campaigns to support their policies of greater economic openness.^{II} These programmes were mainly funded by international partners, except in Vietnam.^{III} None of them have eradicated tenure insecurity in rural or urban households, and some have created new forms of insecurity.

The best illustration of these new forms of insecurity is Cambodia, which is paradoxically the only country to have abandoned the rhetoric of a State that manages all land in the name of the people,^{IV} and to have followed Thailand in recognising individual private land ownership. The delay between the introduction of legal private ownership and the distribution of titles^V weakened the position of occupants of untitled lands and made them more vulnerable to pressure from the elite and foreign interests.

Like its neighbours,^{VI} Cambodia has been subject to large-scale land acquisitions, especially for the agro-industrial and mining sectors. In 1989 the Cambodian government made it possible to establish long-term economic concessions on what was regarded as State-owned land. This new arrangement includes forests and protected areas, which have been used for large agro-industrial projects (maize, cassava) and forestry initiatives (especially rubber). Many small local producers that used to use these lands did not receive the titles they were due in time to avoid being forcibly resettled without compensation in other areas that were already occupied. Some of these forced resettlements have had dramatic consequences for household food security, and sometimes led to serious social and political conflict. Huge amounts of land have been appropriated – at least 2.3 million hectares in Cambodia (63% of

I. Box prepared by Marie Mellac (CNRS, Université Bordeaux 3) and Christian Castellanet (Gret/Mekong Region Land Governance Project).

II. Starting in 1992 in Cambodia, 1993 in Vietnam, 1997 and more recently in Laos, and since 2012 in Myanmar (date of the land laws).

III. World Bank, AusAID, etc.

IV. Apart from forests, which are still managed by the State.

V. Only 520,000 land titles were issued in 2000 (less than 50% of all registered parcels in the country), compared with 3 million in 2014.

VI. Apart from Thailand and Vietnam, which receive less inward investment in land than they make in other countries in the region.

cultivated farmland), and 1.1 million hectares in Laos (more land than all the country's permanent rice fields).^{VII} Cambodia did respond to international pressure by adopting a law on concessions specifying a set of conditions that need to be met before land can be allocated (most notably producing socio-environmental impact assessments), but this law is not enforced at the moment. Cambodia is also a prime example of the way that the State treats minority and historically subordinate groups living in the highlands and forests, as there have only been eight collective land allocations to indigenous communities (out of 455 listed communities). Although the law recognising minority ethnic community ownership of communal property is one of the most innovative in the region, its scope is limited by various administrative and political obstacles that make it hard to ensure that these rights are actually recognised.

All five countries have problems applying their existing laws, partly because it is difficult to enforce them, and partly because of the lack of political will to think about the spatial and social dynamics of production systems that were systematically suppressed during the colonial period as they rebuilt their national identity.

The last convert to titling, Myanmar, has also opted for formalisation, focusing its efforts on rice-growing areas in the lowlands. Like Thailand and Cambodia before it, Myanmar decided not to redistribute land before titling, thereby crystallising existing inequalities between landholders and the landless, who are particularly numerous in Myanmar.^{VIII}

Vietnam is the only country that opted for egalitarian land distribution before issuing land certificates. This was done to support a development policy based on agriculture, which led to a period of prosperity that benefited everyone until the government switched a new development model based on industry. This radical change of direction weakened the status of agricultural land, some of which has been re-designated as a result of changes to legal land categories.

At the moment none of the countries in the region have an open public debate involving all the actors concerned. This will doubtless be one of the main challenges for the future. ■

VII. When the visible impacts of these appropriations on local people and the environment were criticised by NGOs and donors, the two countries finally recognised that they were causing problems and limited them by restricting their size, banning certain concessions (Cambodia in 2001), assessing concessions that had already been allocated (Laos in 2007 and 2009) or temporarily suspending any new agro-forestry concessions (Cambodia and Laos in 2012). However, this has not stopped new land appropriations in Southeast Asia. They have intensified in Myanmar, and there are still questions about where the money generated by existing appropriations has gone and how much of it ended up in the pockets of local and national elites.

VIII. Over half of the population in Myanmar is landless, especially in the centre of the country (source LIFT 2012), compared with 28% of the population in Cambodia in 2009.

Implementing inclusive policies requires a strong, sustained political will and a clear idea of the obstacles that need to be overcome. The practical possibility of implementing effective and equitable formalisation policies is largely dictated by the socio-political contexts at the local and national levels; while their social and economic impacts are shaped by the socio-economic and political context, the coherence and hierarchy of their explicit and implicit objectives, the way that they relate to other sectoral policies, and the way that they are implemented.

There is no mechanical link between formalisation, securing rights, economic development and social peace

● **Formalising rights should not be equated with securing rights**

Land tenure is secure when (any kind of) rights to land and natural resources are enforceable against third parties, and if they are confirmed by the arbitrating authorities in the event of being contested without due cause.²⁶ Secure tenure requires legitimate rights and authorities that are capable of upholding them effectively.²⁷ In contexts where not all rights are formalised, where they are linked with social identities or where institutions are politicised, securing tenure is primarily a political and institutional issue.

'Formal' and 'informal' land rights are secure if they are socially validated, if everyone knows that the rights holder inherited them from their father or purchased them from a known vendor, and if it is possible to successfully appeal to the authorities when they are wrongly contested. Conversely, title holders' rights may be insecure if they were purchased illegitimately or locally contested, if the land is occupied by third parties and cannot be used, or if other, more influential people have title to the same piece of land and the law rules in their favour.

The existence of written documents can significantly increase security of tenure, provided the documents are reliable, reflect legitimate rights, are socially recognised, the land administration is accessible and reliable, the documents are up-to-date and the administration and judiciary refer to them. However, documents will contribute to confusion and insecure tenure if the formalisation process is inappropriate or inaccessible, if land titles can be obtained by dispossessing local actors, if there are frequent mistakes, if the educated take advantage of the illiterate, if files are not updated and documents are not made out in the name of the current owner of the parcel. In such cases formalising rights simply 'modernises insecurity'.²⁸

WHEN LOCAL CONSENSUS IS NOT ENOUGH ...

In many situations, the 'informal' nature of local land rights does not lead to widespread insecurity. Everyone knows who holds which rights, and tensions are resolved by the local authorities. If formalisation does not lead to distortions between the rights held under local norms and the content of legalised rights, formalisation policies can stabilise social agreements by giving them legal backing but do little to increase security of tenure. In situations where there is acute social tension, active but unregulated land markets, or political crises that result in migration, social consensus will not be a given and it will be hard to know who holds legitimate land rights. [cont.]

26. Lavigne Delville P., 2006, 'Sécurité, insécurités et sécurisation foncières: un cadre conceptuel', *Réforme agraire et coopératives*, n° 2006/2, pp. 18-25.

27. Le Roy E., 1996, 'Des autorités foncières légitimées, autonomes et gestionnaires', in Le Roy E., Karsenty A. and Bertrand A., ed., *La sécurisation foncière en Afrique: pour une gestion viable des ressources renouvelables*, Paris, Karthala, pp. 239-250.

28. Jansen K. and Roquas E., 1998, 'Modernizing insecurity: the land titling project in Honduras', *Development and Change*, vol. 29 n° 1, pp. 81-106.

In such cases, formalising rights is more useful, but also more problematic. It is essential to have a clear policy on the rights of displaced persons, mechanisms for mediating and resolving land conflicts, and simple mechanisms for formalising transfers of rights (inheritance, sales, etc.), since the purpose of formalisation is to record and stabilise agreements and the outcomes of conflict resolution procedures. Systematic operations are particularly perilous as their sheer scale increases the potential for error and manipulation, and there is also a risk that contested parcels will not be registered even though the operation is supposed to clarify and resolve their status. In short, there are numerous opportunities to sow the seeds of future conflict. ■

Written titles can help secure tenure if:

- > the formalisation procedure makes sense in relation to the reality of land rights, responds effectively to the problems encountered by different land users, and enables the State to recognise their legitimate rights or authenticate their agreements;
- > the formalisation procedure is accessible and effective, and is part of an institutional environment that is sufficiently interconnected and reliable to deal effectively with the plurality of norms and authorities;
- > land information is kept up to date, so that people benefit from using the legal mechanisms, and the institutions responsible for administering rights fulfil their responsibilities.

● **Formalisation does not have a mechanical impact on investment and land markets**

Formalising property rights is supposed to stimulate economic development. The theory is that producers can use their titles as security to obtain credit, and can therefore invest. However, economic research on family farming contests this link between titles and investment, on the following grounds:

- > the insecurity of 'informal' rights is often over-estimated, which means that formalisation has limited impacts (see below);
- > investment decisions are largely determined by price ratios, access to supply chains and risk – i.e. by the economic environment. The level of productive investment is less constrained by the nature or form of land rights than the unprofitability of agricultural production and imperfections in the market environment (products, inputs, credit);
- > the link between holding property titles and having access to credit is weak, in both rural and urban areas. Many rural areas have no banks, and those that do exist may be unwilling to take the risk of lending to small producers. In urban areas, even when residents of informal settlements hold valid land titles, they prefer to use community-type mechanisms that do not involve mortgaging their home or land;²⁹
- > formalising property rights can weaken indirect land users if it restricts their operations or makes renting land more expensive.

29. Durand-Lasserve A, Selod H., 2007, *The formalisation of urban land tenure in developing countries*, World Bank 2007 Urban Research Symposium, 14-16 May, Washington DC.

The impact on the land market also varies: the market can exist without formalised property rights, and formal procedures may hinder rather than help it. The impact of the land market on equity and productivity is also disputed, as large-scale operations are not always the most productive. In the absence of insurance and credit mechanisms, small producers may resort to 'distress sales', and their land may not end up in the hands of the most efficient producers as it may be acquired for non-economic reasons (prestige, political power) or speculative purposes, particularly by the urban elite. When other aspects of the productive process are dysfunctional (credit, risk, labour, prices, markets, etc.), 'removing the restrictions on markets for land sales may not be the most urgent requirement for increasing efficiency, and may have a negative impact on equity'.³⁰

The issue is different for producers who are not indigenous to the region, and especially for national agribusinesses (small and large-scale). These producers, especially those whose operations require ongoing investment (plantations, irrigation), may feel that social recognition provides them with insufficient security of tenure. Most want legal documents before they are prepared to invest, even though asking for this kind of document may be perceived as a breach of their social relations with the people who assign them the land.³¹

WORLD BANK ECONOMIC RESEARCH REVEALS THE LIMITATIONS OF THE STANDARD THEORY OF PROPERTY RIGHTS

While recognizing that '*numerous studies have confirmed the positive impact of titling where the conditions are right*' (p. 259), Deininger and Binswanger¹ emphasise that '*titling is not a panacea for achieving a wide variety of divergent goals at the same time. The objective — whether it is to improve credit access, increase tenure security, or activate land markets — must be clear*' (idem). They identify numerous conditions for relevance: '*although individual titling has great potential to increase investment and productivity, several preconditions must be satisfied for this to be a desirable intervention. (...) Titling should (...) fit within a broader strategy of rural development. Otherwise, imperfections in other factor markets may undermine or even eliminate the advantages from possession of title, at least for the poor*' (pp. 248-249). '*Even if the above preconditions are satisfied [but there are inequalities in land distribution and access to credit], titling might make it easier for large producers to access credit but would not make small landowners creditworthy, a situation that would deepen preexisting inequalities*' (p. 260). Emphasising the 'preconditions', they highlight the risk of negative effects and question the supposedly mechanical link between titles, credit and productivity. '*Formal title, under conditions of low population density, is not necessarily the most cost-effective and desirable way to ensure secure tenure*' (p. 269). '*Removing the restrictions on markets for land sales may not be the most urgent requirement for increasing efficiency — and may have a negative impact on equity*' (p. 249). ■

I. Deininger K. and Binswanger H., 1999, 'The Evolution of the World Bank's Land Policy: Principles, Experience, and Future Challenges', *The World Bank Research Observer*, vol. 14 n° 2, pp. 247-276.

30. Binswanger H. P., Deininger K. and Feder G., 1993, 'Power, distortions and reform in agricultural land markets', in Chenery H. B., Srinivasan T. N. and Behrman J. R., ed., *Handbook of Development Economics*, Amsterdam, Elsevier Science, pp. 2659-2772.

31. Faure A., 1995, *L'appropriation privée de la terre en milieu rural: politiques foncières et pratiques locales au Burkina Faso*, London, ILED, 16 p.

Economic research is very cautious about the opportunities presented by formalising private property rights and liberalising the market, especially in situations where there is little pressure on land, but also when *'there are significant imperfections in related markets'* – as is frequently the case in countries that are debating whether or not to formalise rights. In such contexts, the priority for agricultural development policies should not be formalising rights, but focusing on other aspects of production (prices, risks, credit, labour, etc.).

● Formalisation may reduce or aggravate conflicts

The existence of a plurality of norms can encourage conflict in the sense that certain actors may play on the contradictions between different norms. But the problem is not so much the plurality of norms, as the gaps in institutional frameworks that are unable (or unwilling) to accommodate this plurality, establish a hierarchy of powers or set out procedures for the different authorities. Problems with insecure tenure often stem from competition between the arbitrating bodies and poor land regulation, and the escalation of certain conflicts is partly due to the State's inability to contain them.

Insecure tenure may be structural in highly conflictual contexts dominated by violence and adversarial power relations, or the result of specific situations. Common triggers of conflict or abuses of power include sales (which are a frequent source of conflict), unclear or contested territorial boundaries, and tensions between migrants and indigenous residents in areas receiving a large number of migrants, especially when land relations are renegotiated as one generation of migrants succeeds another.

WHY ARE THERE SO MANY CONFLICTS OVER LAND SALES?!

There are relatively few causes of conflict over land. Sales are the main trigger of disputes in many parts of rural Africa, where they have become increasingly common despite not always being regarded as legitimate as a matter of principle (in which case transactions are conducted discreetly). Under customary norms, land is a lineage group or family asset that should be preserved for the whole family and its future descendants, and should not be broken up and sold. If the manager of the family's land assets sells a parcel without the prior agreement of the rights holders, it is highly likely that one of them will contest the transaction.

In certain regions sales are a longstanding practice covered by explicit customary procedures. But most of the time they are not really regulated by local norms or by State mechanisms. The latter only recognise transfers of parcels covered by ownership documents as legal transactions.¹¹ As a result, land sales develop in a 'grey market' that is neither totally hidden nor completely transparent. *[cont.]*

I. This box was prepared with contributions from Jean-Philippe Colin (IRD). See also Mathieu P. and Lavigne Delville P., 2003, *Making land transactions more secure in the west of Burkina Faso*, IIED/Gret/IED/UERD, 36 p. Colin J.-P., 2013, 'Securing rural land transactions in Africa. An Ivorian perspective', *Land Use Policy*, vol. 31, pp. 430-440.

II. In Laos, the sale of an unregistered parcel triggers its registration: an agent from the land administration measures its boundaries and registers the parcel when the sale is concluded. Groppo P., Mekouar M., Damais G., et al, 1995, 'Politique de régularisation foncière pour une agriculture durable en République démocratique populaire lao', *Land Reform, Land Settlement and Cooperatives*, pp. 63-88.

Sales are often contested by rights holders who discover that a transaction has taken place without their permission. This kind of retrospective challenge may concern the sale itself, the lack of prior discussion or the distribution of the proceeds of the sale. There is often some ambiguity regarding the content of the transaction or rights that are assigned: for example, an indigenous owner may think they are assigning cultivation rights while the purchaser thinks they are buying full rights to the parcel. These ambiguities may be used to force a renegotiation of the content of the transaction if one of the parties concerned – usually the vendor or one of their descendants – challenges the existence or content of the sale.

When pressure on land is intense or land values rising rapidly, rights holders may try to renegotiate the purchase price or recover land that has been sold, playing on ambiguities in the transaction or even reselling the same parcel to several people. When the market is not regulated, sales may be organised by rights holders who are not involved in managing the family land assets, or by migrants long settled on land controlled by an indigenous lineage group. Some purchasers are even prepared to buy parcels in dubious circumstances, hoping that their political or economic power will enable them to deal with subsequent challenges to the transaction. In peri-urban areas in particular, the potential gains to be made from buying and developing land far outweigh the risk of losing several parcels.

Many local actors use endogenous formalisation procedures to prevent such conflicts arising, witnessing and documenting their transactions.^{III} These procedures tend to evolve and take shape over time, and are by no means infallible: i) they often use euphemisms, talking of ‘assigning’ rather than selling the land, which makes the content of the transaction ambiguous; ii) the person who signs as the ‘vendor’ is an individual, and there is no guarantee that all family rights holders have agreed to sell part of the family land assets; iii) site visits with neighbours to determine the boundaries and validate the change of ownership do not always take place; iv) sales are not always properly dated, registered or recorded. ■

III. Lavigne Delville P., 2002, ‘When Farmers Use ‘Pieces of paper’ to Record Their Land Transactions in Francophone Rural Africa: Insights into the Dynamics of Institutional Innovation’, *European Journal of Development Research*, vol. 14 n° 2, pp. 89-108.

In post-conflict settings, formalising rights can help stabilise the situation and re-establish peace. But in cases where populations have moved, people have fled or refugees have settled in the area, negotiations and mediation are essential in order to define who has which rights to what parcel.

Formalisation can only work when there is a certain level of consensus over the rights concerned, otherwise it can lead to dispossession and resentment and cause renewed conflict. Therefore it should be a gradual process used to legalise socially stable situations.

Systematic procedures to formalise private property pose two major problems

● They do not take account of collective rights and can lead to exclusion

Land relations vary across each country.³² They change, and go through various processes of individualisation and commodification – processes that are gradual and partial, fluctuating according to the social and economic issues in the area concerned. Policies that focus exclusively on private property will inevitably exclude or destabilise agricultural and pastoral production systems, which use other forms of land appropriation and spatial organisation in order to adapt to specific contexts. This is especially true of pastoralism, whose economic effectiveness is inextricably linked with mobility.

THE SPECIFICITIES OF PASTORAL LAND TENURE^I

Developing countries seem to have a longstanding blind spot about pastoral land tenure. In Africa south of the Sahara, in particular, it has suffered from a dualistic division between sedentary and nomadic societies, and being legally defined in relation to the status of land reserves. This led to an emphasis on criteria of immobilisation (in both the geographic and legal sense), even though pastoral life is determined by mobility and continuous adaptation to a constantly changing environment.

The 1990s saw the rise of a new paradigm for land tenure which centred on the fact that control of pastoral resources is not based on a 'geometric' plot-based system, and took account of the specificities of pastoralism.^{II} Its focus was not on land reserves that could (like home territories) be subject to potentially exclusive priority rights, but on resource access and use as common goods that contribute to human and animal reproduction. Rights mainly relate to fodder from grass and trees, minerals for salt cures, watering herds at pools, traditional and improved wells and waterholes. Grazing may extend over considerable distances, depending on the variability of the rainfall. Access to and use of resources (including fruit, tubers, wild millet and other seeds collected for human consumption) is prioritised according to scarcity. In the Sahel, gum trees and cereal crops (which are usually surrounded by thorny fences to protect them from livestock) are covered by exclusive rights, while rights to wells dug on an individual's land can be transferred at their discretion, as can rights to privately owned livestock. There has been an increasing focus on ownership and territoriality in pastoral 'settlement sites' even though this is not appropriate in pastoral settings, as demonstrated by the catastrophic effects of ranching^{III} for the Maasai in Kenya. ■

I. Prepared by Etienne Le Roy and André Marty.

II. Cf. Daget P. and Godron M. ed., 1995, *Pastoralisme: troupeaux, espaces et sociétés*, Hatier/Aupelf-Uref; Bourgeot A. ed., 1999, *Horizons nomades en Afrique sahélienne: sociétés, développement et démocratie*, Paris, Karthala.

III. Extensive livestock rearing or pastures.

32. See in particular, Le Roy E., 2011, *La terre de l'autre. Une anthropologie des régimes fonciers d'appropriation foncière*, Lextenso Editions, Série anthropologie, 439 p.; Le Bris E., Le Roy E. and Mathieu P., 1991, *L'appropriation de la terre en Afrique noire: manuel d'analyse, de décision et de gestion foncières*, Paris, Karthala/Aprefa.

Where the system of land appropriation is based on family land holdings, the introduction of voluntary individual private property undermines the foundations of the society concerned, weakening the safety net it offers in the absence of any State-sponsored social security. This is particularly true when the concept of private ownership being promoted is absolute and based on purging all existing rights, as in the Torrens system³³ and registration (which is the opposite to the Civil Code type of ownership that includes restrictions and obligations to respect the rights of third parties) which does not allow for the division of property (usufruct, bare ownership and the possibility of overlapping rights to a single piece of land, as with hunting rights on private land, etc.).³⁴

This could be regarded as a price worth paying for a pro-active economic development policy. However, privatisation can weaken local economies and have negative economic impacts. Agri-business, which concentrates land and is heavily reliant on imported products, such as machines, diesel and fertilisers, may be profitable for the entrepreneur but detrimental to society; while family farming redistributes a significant proportion of its added financial value in the country concerned. The cost/benefit ratio of privatisation should be very carefully considered in cases where there is an unfavourable institutional and economic environment, profound asymmetries and 'imperfections' in 'related markets', and where, as economic research has shown, privatising land and promoting the land market have little chance of producing the expected positive effects. The economic relevance of policies to formalise private property rights depends on the context; whether or not they are opportune depends on the broader economic and institutional environment.

● **Many States lack the administrative or financial capacities to implement formalisation policies**

If policies to formalise standard rights are to be reliable and effective, the state land services need to have the administrative capacity to issue everyone with proper legal documents at a cost that can be borne by the State and its citizens. Once the documents are issued, it is important to keep updating land registers as rights are transferred. However, this is not always possible as many States lack the financial and administrative capacities to do so, the land administration is often concentrated in large cities, and the land services are left to 'manage' the resulting confusion. In such contexts formalisation simply results in poorly processed files, bottlenecks in issuing legal documents or registering changes, and land information systems that are soon out of date. The demand for formalisation is another issue, as there is little incentive to register changes when the administration is far away, procedures are complex and expensive, and local practices to formalise transactions are seen as providing sufficient security of tenure.

The inability to register changes in land rights is a major problem that leads to new distortions between legitimate and formal rights, and new sources of confusion, conflict and insecurity. This is a problem even in countries with a strong administrative capacity, such as Mexico. The focus on land registration operations (land surveys, studies) with high quantitative

33. Created in Australia to give absolute land rights to British colonials, in total negation of Aboriginal people's land rights. The Torrens system inspired the land registration regime in francophone Africa, which issues 'absolute' ownership rights that are 'purged' of all other claims or rights.

34. Comby J., 1989, 'L'impossible propriété absolue', in Adef, ed., *Un droit inviolable et sacré: la propriété*, Paris, Adef, pp. 9–20; Comby J., 2010, *Overlapping land rights in Europe*, Briefing Notes, Paris, 'Land Tenure and Development' Technical Committee, 4 p.

objectives can lead to confusion between the means (surveying parcels and registering rights) and the end (sustainable, effective and efficient administration of formalised rights). Technological developments have not resolved some serious problems with registering changes, bringing us back to the question of demand for reform of the land administration – and thus the real level of popular interest in formalisation – and the economics of the mechanisms concerned.

FROM FORMALISATION TO INFORMALISATION: THE EXAMPLE OF *EJIDALES* IN MEXICO^I

After reforming the legal framework for its agrarian reform in 1992, Mexico launched a large certification programme to delineate, map and register the land rights of over 5.5 million people across nearly half of the country (around 100 million hectares of land). This programme recognised the rights of members of the *ejidos*, communities created in the context of the agrarian reform, whose land is held as collective property but who are allocated individual rights to use and transfer land through inheritance (to a single heir). The agrarian reform laws strictly prohibited certain types of land use and transfer, making direct use obligatory and banning sales and indirect land use. Beneficiaries responded by developing informal practices in order to overcome the daily constraints to production (subdividing, renting and lending land, making conditional sales), which meant that the land registers and rights recorded in them quickly became out of date.

The legal reform of 1992 was supposed to remedy this situation by recognising existing rights holders and their rights and authorising market transactions, while maintaining certain prohibitions in order to limit land fragmentation and the risk of land concentration (limiting succession to a single heir, restricting the market to members of the *ejidale* community). This reform was accompanied by a rights certification programme, the *Procede*, which allowed unofficial rights holders to voluntarily regularise their situation with the administration free of charge. This pragmatic approach led to the rapid implementation of the reform in the vast majority of *ejidos* across the country^{II} and greatly increased access to land rights – resulting in a 20% increase in rights holders between 1991 and 2001. Over two-thirds of these new rights holders formed an intermediate category of *posesionarios*, who had recognised property rights to agricultural parcels but no right of representation on the local land governance bodies or access to the collective resources of the *ejido*.

Some of the mechanisms of the 1992 reform and administrative practices of the services responsible for land registers perpetuated informal methods of transferring land. The ban on subdividing certified parcels through market transactions or inheritance resulted in large amounts of land being transferred without reference to the land administration – or, in many cases, to the community authorities. Many families whose farms were failing sold off parts of their land-holdings (distress sales) or gave parcels to family members during their lifetime to help support title holders. These strategies to bypass the official norms contributed to greater institutional pluralism and meant that the administrative registers established through the *Procede* soon become out of date. It is estimated that only 40% of new rights holders are officially registered.

Informality remains a 'structural' characteristic of land relations in the *ejidos* some 20 years after the legal reform and start of certification. This causes tension and conflict. Case studies from southern Veracruz show that transactions relating to parts of certified parcels and the informalisation of inheritance processes have contributed to sometimes violent conflicts that the local, administrative and legal authorities find very hard to regulate. ■

I. Box prepared by Éric Léonard (IRD) and Hector Robles Berlanga (University of Mexico).

II. See Bouquet E., 2010, 'Politiques publiques et changement institutionnel: légalisation, formalisation et sécurisation des transactions foncières au Mexique', in J.-P. Colin, P.-Y. Le Meur, E. Léonard (eds.), *Les politiques d'enregistrement des droits fonciers: du cadre légal aux pratiques locales*, Paris, Karthala: 333-364.

While this does not necessarily cast doubt on the advisability of formalising rights, it does raise questions about the conditions for feasible and successful formalisation – especially the mechanisms chosen by the land administration (State land services or intermediate mechanisms based on existing local institutions, especially communal bodies), and the modes of finance and timescale for formalisation (pace of operations vs pace of policy). These have a significant bearing on the administration's ability to function across the country, and to develop the capacity to monitor and process the registration of a growing number of land parcels.

Increased options offered by 'alternative' formalisation policies

The last 20 years have seen an enormous amount of research into alternative procedures for formalising rights. In rural areas, these cover a wide range of practices, from formalising individual or collective rights to delegating sovereign land management powers over certain spaces to neo-customary or elected authorities. In urban areas, affordable 'alternative' approaches to land titling for residents of informal neighbourhoods include *in situ* regularisation, participatory mapping of land occupancy and issuing collective certificates of occupancy.

These experiences have considerably broadened the range of options and provide useful reference points for most situations and issues, but have rarely progressed beyond pilot projects and been incorporated into national policies.

● **A broad range of existing approaches**

The expectations and practices associated with these approaches vary greatly, usually (but not always) according to the social and land characteristics of the settings concerned. They can be categorised according to several criteria:

- > **The range of possible legal statuses:** formalised rights fall into legally defined categories, and may be individual or collective. Alternative approaches often use new types of status, such as 'land certificates', alongside classic land titles. These certificates may confirm the status of 'untitled private property', as in Madagascar, or cover varied 'bundles of rights' to land and natural resources. So-called alternative approaches often recognise the existence of 'common family property' while policies tend to deal with common spaces, resources and landholdings by privatising them. Certain approaches specifically focus on these common areas, delimiting livestock routes and spaces, marking out forest lands and delegating management to local authorities, etc.
- > **Demand-led or systematic formalisation:** formalisation may be a voluntary, demand-led procedure, in which case it confirms the co-existence of registered and unregistered spaces, and a specialist administration is not advisable unless it has other land management responsibilities. Systematic formalisation involves registering all the parcels in a given area (territory, village, commune, etc.), which helps reduce unit costs and facilitates more organised procedures for identifying and validating rights with multi-stakeholder surveys and a publication phase. But systematic procedures tend to

privatise common spaces if they are not identified and secured before the plot surveys, and to overlook, marginalise and weaken endogenous ways of securing rights and agreements.

- > **Whether or not they use professionals and complicated equipment:** Procedures to identify and validate rights range from the simple to the sophisticated (mapping materials, documenting agreements, information systems, etc.). The more complex methods require specialist staff (surveyors, researchers, notaries, administrative authorities, etc.). Technically sophisticated and systematic procedures usually require professional interventions, which have cost and planning implications and tend to lead to greater reliance on land registers and the State authorities during formalisation. Conversely, costs can be reduced by using participatory mapping procedures or GPS by local agents.
- > **The type of institutions and authorities responsible for managing rights:** different types of institution are responsible for administering and managing changes in registered rights in different countries. They may be State, communal, neo-customary or hybrid institutions. State institutions may be part of a devolved administration or a specifically mandated body; at the communal level, rights will be managed by the mayor or specific land services. Depending on the setting, these institutions rely on a range of local actors who help authenticate rights (village chiefs, customary and religious authorities, neighbours, etc.). Whatever the case, the authorities' capacity to properly manage land matters is often limited. This prevents the mechanisms that have been put in place from functioning smoothly, especially when they involve complex and cumbersome procedures.

There are certain logical links between these different categories, which exist in many possible combinations. Systematic registration may focus on private property or on land management; it may involve mapping and rely on local authorities to manage rights; and may also lead to the co-existence of formalised and non-formalised parcels if there is little demand for titles in the broad sense of the term. Conversely, demand-led formalisation may rely on more or less sophisticated technologies and complex procedures, be used to standardise land rights, encourage or lead to their individualisation, or tip them into State-led modes of administration.

● **'Alternative' procedures have led to real progress...**

The 'alternative' procedures that have been tested over the last 30 years have helped broaden the debate and have generated some original concepts and tools. They offer new legal categories that more closely resemble local practices and systems, and are based on changing technologies (mapping, information systems, etc.) – some highly sophisticated and some simplified to enable all kinds of actor to appropriate and use them to discuss, defend and manage their rights.

Geomatics can be used to generate multi-layered information systems covering a wide range of individual and collective use and property rights. Some of these new technologies are now easily accessible to local people and local administrative officials. Tools are no longer seen as ends in themselves, but used to help local people and institutions, drawing on a much wider range of skills to design and adapt their content and application (computing, mapping, anthropology, sociology, geography and agronomy).

CHANGING INFORMATION SYSTEMS: THE EXAMPLE OF THE PACR IN SENEGAL¹

In 2008 the Government of Senegal launched a huge Rural Communities Support Programme (PACR) to equip rural communities in the River Senegal Valley with the tools, procedures and expertise to manage the land under their control more effectively. The main objective was to implement a land information system (LIS) that would provide 'a series of principles regulating the collection, processing, storage and use of data on land ownership, and the use, quality, location and development of all data in order to inform decision-making based on these principles.'¹¹

Due to the lack of LIS technical skills in the rural land services, the PACR started by working with future users to develop different types of paper-based tools (cadastral mapping, registers, etc.), and then progressed to electronic formats. Applications were adapted to take account of the diversity of situations as regards social factors and land characteristics, and LIS skills, with regular, focused training to help users appropriate the tools and master the procedures. The programme thus aims to improve land management actors' knowledge of their territory and how it is used, and better to equip them to fulfil their roles. By identifying local practices that are currently 'outside the law' and making the authorities aware of them, it will also help feed current reflection on the national land reform. ■

I. Box prepared by Mathias Koffi (PTD/Sofreco) and Claire Galpin (Géomètres sans frontières and Fief).
II. African Union land policy framework and guidelines.

These procedures aim to put in place formalisation mechanisms that are more affordable and accessible for local people. 'Alternative' formalisation using certification and related documents costs much less than 'standard' formalisation through registration and private and individual property titles; new mechanisms that require central and local governments and customary authorities to work together have brought land information management closer to land users. Some initiatives are trying to put in place new forms of land governance, and to disseminate simplified procedures translated into local languages in order to take power out of the hands of rent-seekers and local elites.

AN INEXPENSIVE DECENTRALISED PROCEDURE FOR OBTAINING RURAL LAND OWNERSHIP CERTIFICATES IN BURKINA FASO¹

The land regime established under Burkina Faso's Agrarian and Land Reform (Law 034-2012 regarding the ALR) is based on registration and property titles. Since 2007, the National Rural Land Security Policy (PNSFMR, decree n° 2007-610) has adapted the land legislation in order to recognise local practices and land rights, support family farms and involve the customary authorities in land management. In order to [cont.]

I. Box prepared by Peter Hochet (Laboratoire Citoyennetés) and Saïdou Sanou (Odec).

enforce this policy, Law 034-2009 on the rural land regime and its implementing decrees have introduced three major innovations into the procedure prescribed by the ALR.

The costs of registering rural land rights are set out in a detailed schedule of relatively low fees. These consist of a fee for issuing rural land certificates (APFRs; Decree n° 2012-1042), and fees received by the administration for issuing APFRs, some of which are set by the State, and some by the communes (Decree n° 2012-862). The fees for issuing APFRs vary according to whether: i) it is the first time a certificate has been issued for this piece of land, or if it records a transfer of rights; ii) the land is in a rural commune or village territory attached to an urban commune; iii) the parcel is part of a larger piece of land; iv) the land is individually or jointly owned, with rates set according to a standard formula. An individual APFR costs six times as much as a collective APFR, and individual APFRs for transfers are 13 times more expensive than the original individual APFR. Registration costs are very low, and the whole mechanism is designed to support collectively owned family farms and discourage market land transactions, especially for large amounts of land.

The institutional mechanism involves a mixture of customary authorities, municipalities and devolved State services. At the village level, village land commissions and village land conciliation commissions are chaired by the customary authorities, who collaborate with the rural land services, and land offices in urban communes when applications for APFRs are submitted and rights to parcels are established. The rural land services collaborate with the devolved services of the ministry that was responsible for finance when the applications were processed (authorisation from the State property revenue collector and public land registry) and the geo-referenced data on the parcel concerned were registered (regional cadastral service).

The whole procedure for issuing rural land ownership certificates is decentralised. It takes place in the main town of the commune (rural land services) and the villages. This helps reduce the transaction costs for local people, although they are still high for isolated and remote villages. ■

● ... but there are still problems to resolve

The distinction between standard methods (systematic formalisation of private property by the State land services) and 'alternative' methods (demand-led formalisation of different types of local rights by the local authorities) does not take account of the different content of the procedures to be implemented, or the fact that certain so-called 'alternative' policies are very similar to 'standard' procedures.

Systematic procedures to formalise individual or collective local land rights aim to provide a 'snapshot of rights', but rarely incorporate the rights of other resource users or family rights holders, because their underlying concepts of property are often shaped by notions of 'absolute' ownership inherited from the colonial past. Common spaces are often registered in the name of a particular family or individual, the emphasis is on ownership or possession, and many procedures still favour farmers over herders and owners over tenants. There is also an assumption that increased regulation of land will quickly lead to land administration, which again raises questions about local demand, registering changes, and the accessibility and reliability of the land administration.

RURAL LAND USE PLANS IN BENIN ONLY COVER PART OF THE COUNTRY, AND THERE IS LITTLE DEMAND FOR CERTIFICATES^I

In Benin, rural land use plans (RLUs) are supposed to systematically map all village lands. In practice, however, the '300 RLU' project implemented between 2007 and 2011 only mapped certain village lands. Project operations excluded most hamlets, and thus migrants (even those who had settled in the area long ago), and revealed and caused land conflicts. The status of village land reserves is not clear; some villages did not want to register them, and in others they were recorded in the name of the land chief, running the risk of transforming him into a 'major landowner'. The project teams did not have enough time to record all the land, and the whole operation created serious inequalities between producers whose parcels had been recorded and those whose parcels were not, as well as potentially weakening the position of migrants, who cultivate a large proportion of the land. The desire to work fast in order to produce results led to numerous errors.

The project ended suddenly, before any land certificates were issued, and when local institutions were barely up and running. The town halls were not fully included in the process, and showed varying levels of commitment to it. Even though the certificates cost very little (2,000-5,000 francs CFA per parcel), demand was very low, especially in central and northern Benin, where people had little use for them due to the lack of activity on the land market. A number of producers said that they would ask for certificates when they needed them^{II}. ■

I. Box prepared by Philippe Lavigne Delville (IRD).

II. See Moalic A.-C., 2014, *Les enjeux locaux de la formalisation des droits fonciers en Afrique rurale. Analyse de la diversité des appropriations et réinterprétations du dispositif PFR: Cas des communes de Dassa et Savalou, département des Collines, Bénin*. Thesis, Istom, Cergy-Pontoise, 92 p.

Formalisation strategies that aim to take account of complex rights need more sophisticated mechanisms and procedures than those covering simple private property, which means that the agents responsible for socio-land surveys and administering rights need to have particular skill sets.

Policies that place land governance at their centre have the advantage of taking the plurality of institutions into account. They explicitly raise the question of land regulation, and as they regard security of tenure as a primarily political and institutional issue,³⁵ they are naturally more sensitive to local inequalities and the political dimension of tenure security. Setting up hybrid land governance institutions may well be a relevant response, but it is a difficult and complex task requiring knowledge and expertise that is not always available at the local level. More needs to be done in this respect. Finally, the choice of strategies – and the balance between reshaping land governance and registering rights – is also determined by political choices about relations between the State, its citizens and the local authorities.

While new technologies such as GPS and GIS can make operations to survey plots and process information more productive, they cannot reduce the time needed for preliminary mediation and negotiation procedures or remove the need for socio-land surveys to reliably

35. See Chapter 2.

identify rights holders. Therefore, they are less helpful in increasing the productivity of formalisation operations than they are made out to be. And if they are not designed to be mastered by local actors, sophisticated technologies can create new dependencies on professional experts, which increases operating costs and causes problems in areas where local electricity supplies and technical skills are unreliable. When selecting technologies it is important to take account of the institutional, material and economic context in which they will be used.

THE CHALLENGES OF SETTING UP LAND INFORMATION SYSTEMS IN MADAGASCAR^I

In 2005, Madagascar defined a new land policy that ended the State monopoly on land, recognised untitled private property and introduced land certificates. Land management that had previously been the exclusive preserve of the state land and mapping services was to be decentralised to new communal-level land offices, which would use local land use plans (LLUPs) to define and demarcate parcels prior to their certification. Mayors were empowered to issue land certificates following a public procedure to identify rights holders.

All communes that have a land office have paper copies of their LLUP, which also exists in digital form that can be used to register and archive land information. Those with no access to an energy supply or computer equipment manage the documentation and digital land information with support from Land Resource and Information Centres (LRIC).^{II} However, land offices are not systematically attached to LRICs, especially if they are computerised and can generate land information and documents themselves. The central administration consolidates land information from the LLUPs on another computerised information system, the Madagascar Land Management (MLM) programme, which is supposed to be the national database for land certificates and individual private property titles. A total of 234 LLUPs were created between 2006 and 2009 as part of the project to modernise and secure land tenure in Madagascar.

An initial assessment of this initiative shows that although surveyors have started using computerised topographic plans, the central land administration has not appropriated the proposed information systems. It never really geared itself up to using the MLM software, partly due to lack of support and partly because it felt weakened by a reform that put the communes at the heart of land management. Nor has it fulfilled its role in providing technical training for the communal land offices and LRICs. At the decentralised level, it has been difficult to sustain the use of LLUPs as certification does not generate sufficient revenue to cover the operational costs of the land offices and LRICs. Staff became demotivated by their lack of financial autonomy, and the training on Land Information Systems and computerised LLUPs for LRIC staff targeted private groups seeking to improve their skills. There were several resignations, and because the skills acquired through the training were not transferred as intended, the LRICs closed down as they lacked the necessary competences to use the new technologies they were supposed to manage. ■

I. Box prepared by Jean-Philippe Lestang (FIT conseil).

II. Crifs are responsible for the technical aspects of processing land information for about 10 communes.

Insufficient consideration is often given to the mechanisms that will be used to administer registered rights and the means of ensuring their long-term effectiveness. There is not always much demand for certificates, which are sometimes unaffordable for a large proportion of the population, and registering changes and updating land information is still problematic. Extending a devolved or decentralised land administration across the country (prefectures, sub-prefectures, communes, villages, etc.) takes time, requires particular skills to undertake often complex tasks, and considerable resources that may not be easy to fund. This level of effort may be hard to justify in areas where land values are low and land transactions few and far between.

CERTIFICATION IN COTE D'IVOIRE: A COMPLEX AND EXPENSIVE PROCEDURE^I

The procedure for certifying rights in Côte d'Ivoire is demand-led. It consists of five main phases: (i) an official request for a survey to identify rights and rights holders, (ii) the survey procedure, (iii) validation of the survey, (iv) issue of land certificates, and (v) registering them. The fact that each phase involves several actions makes the technical aspects of rights registration operations quite complex and cumbersome. Applicants are expected to pay for the investigating commissioner and certified surveyor who conduct the surveys. The Departmental Directorate for the Ministry of Agriculture charges between 150,000 and 200,000 francs CFA (€200–€300) depending on the application and the department. This fee is divided between the different officials responsible for each stage of the certification process (departmental director of agriculture, regional director, land agent, investigating commissioner, village land management committee, sub-prefectoral land management committee, prefect, and so on). Operations to survey the rights claimed by the applicant only start once these fees have been paid; and the same applies to the technical files on parcels prepared by certified surveyors. In 2012 there were 28 technical operators approved by licenced surveyors, charging prices that were well beyond the means of most small producers. Each certificate has to be signed by the prefect and then published in the official government journal, which costs another 40,000 FCFA (€61). On average, each land certificate costs the applicant 700,000 francs CFA (€1,067).

While it is often essential to conduct a topographical survey to determine the size and location of a parcel, this does not necessarily have to be done by a licenced surveyor. The complexity and cost of these procedures effectively place certification beyond the reach of all but the urban elite who want to buy land for plantations. The Ministry of Agriculture could train and equip its own agents to conduct surveys and produce parcel plans, and establish and publish an official scale of the cost of these operations to avoid overcharging.^{II} ■

I. Box prepared by Georges Kouamé (Institute of Ethnology, Université Félix Houphouët Boigny d'Abidjan).

II. Colin J.-Ph., 2013, 'Securing rural land transactions in Africa. An Ivorian perspective', *Land Use Policy* 31: pp. 430-440.

Even policies that seem to be highly inclusive on paper can lead to exclusion, exacerbate inequalities and provoke short- or long-term conflicts over land. The gap between a policy's intentions and its impact is even greater when there are discrepancies between its

content and the reality of the mechanisms involved at each stage of the process (bills, laws, decrees),³⁶ their relative autonomy from each other, and the institutional incentives driving those responsible for their implementation. There are many obstacles and impediments to the implementation of inclusive policies, from overly standardised visions of the law and complex and cumbersome bureaucratic procedures, to attempts to reintroduce professional monopolies and blatant abuses. All carry costs that create new obstacles to access by local people. Defining and implementing effective but simple and affordable procedures require a strong political will and constant vigilance.

Other options or complementary approaches to formalise rights and create lasting security of tenure

● Formalising transactions

The reasoning behind efforts to secure tenure and regularise extra-legal arrangements is largely based on the assumption that this can best be achieved through formalising rights to plots of land and State-generated legal documents affirming ownership or possession of the parcel. There are several drawbacks to this process:

- > the person or persons holding rights to the parcel have to be identified, which can be problematic in situations where there is a plurality of norms, conflicting claims or overlapping rights;
- > there is not always an immediate need or demand for documentation; many people carry on using existing local procedures to formalise transactions;³⁷
- > the capacity to register all changes in real time has to exist from the outset (including inherited lands, which generate less demand for legal documents).

The processes involved in formalising rights to a particular parcel, agreements, and transfers of rights are driven by different processes and needs. In one case the focus is on assessing the 'supply' of parcels; in another the focus is on 'change' and formalising changes and alterations in order to avoid subsequent contestations.³⁸ Parcel plans are an indicative representation of the state of ownership at the time of registration; they have no legal value and are not intended to be exhaustive, at least not in the short term – parcels are registered as changes occur.

Formalising agreements and transfers is certainly a promising option. It is supposed to deal with changes rather than all parcels, which better reflects demand for the process and enables the land administration to gradually become stronger as changes occur. It is only when a parcel is sold that it leaves the local social customary space, passing from the local regime to written law and management by the land administration. Focusing on formalising transactions avoids the need to describe all local rights (in all their complexity) by concentrating on the content of the transaction, the rights that are being assigned (rights of use, access, etc.) and the legitimacy of the transfer. Looking at local innovations in terms of privately agreed and 'unofficial contracts' (*petits papiers*) while giving them a legal and institutional framework

36. Mosse D., 2005, *Cultivating Development. An Ethnography of Aid Policy and Practice*, London Pluto Press.

37. Boué C. and Colin J.-P., 2015, *Formalisation légale des droits fonciers et pratiques informelles de sécurisation des transactions dans les Hautes terres malgaches*, Cahiers du Pôle foncier n° 9, Montpellier, Pôle foncier, 20 p.

38. Comby J., 1995, 'Comment fabriquer la propriété?', *Etudes foncières* n° 96.

strengthens these arrangements and reduces the risk of conflict and contestation by supporting both the social and legal recognition of transactions. Where necessary, cartographic materials could be incorporated into the process. This approach seems to have been overlooked, even though it is closer to the way that rights have been formalised in industrialised countries,³⁹ and better reflects local demand for formalisation and documentation. It could be a pragmatic approach to reducing insecurity of tenure, and a way of enabling the land administration to gradually gain in strength.

Focusing on transactions and proof of acquired rights also avoids duplication: when transfers are covered by a written contract, and validated and registered by a public authority, there is no need to repeat the procedure to obtain a certificate affirming rights that are already known.

LAND COMMODIFICATION, CONFLICTS AND SECURING TRANSACTIONS IN COTE D'IVOIRE¹

There are three main types of land transaction in the forested areas of Côte d'Ivoire, which mainly involve indigenous landowners assigning land to non-indigenous purchasers or producers:

- > **Sales usually involve indigenous individuals assigning forest stands or regrowth to migrants who want the land for perennial crops** (cocoa, coffee, rubber, oil palm). The purpose of the transaction, the rights transferred and the obligations associated with the transaction are not usually explicitly stated, making it unclear whether the vendor is selling the land or the right to plant crops on it, whether the sale ends the 'incoming' purchaser's 'duty of recognition' to the indigenous vendor, and whether it can be regarded as a 'full' sale. Because transactions are often closely bound up with social relations of (neo)mentorship, payment of cash does not necessarily end the relationship, but may initiate or perpetuate it.
- > **Sharecropping is increasingly used to create cocoa, palm and rubber plantations.** In these arrangements the landowner provides the land and the producer provides the capital and labour needed to create the plantation. When it becomes productive, the plantation, land and/or harvest are shared. Here too, agreements are not always explicit about the technical conditions or timescale for creating the plantation, whether or not food crops that may be grown on the plantation will be shared, etc.; and the transaction does not annul the producer's 'duty of recognition' to the landowner.
- > **Land is usually rented to grow food crops.** Most agreements cover a single growing season, and involve an upfront cash payment before cultivation starts. Rental agreements tend to reflect less 'embedded' social relations than sales or sharecropping arrangements.

Rental agreements rarely cause tension or conflict, but sales can be highly contentious. In a context of dwindling land reserves and an economic crisis that has forced the unemployed and uneducated back to their home villages, the younger generation [cont.]

I. Box prepared by Jean-Philippe Colin (IRD).

39. Comby J., *op. cit.*, Stamm V., 2013, 'Formaliser les pratiques coutumières. Europe médiévale, Afrique coloniale et contemporaine', *Etudes rurales*, vol. 191 n° 1, pp. 169-189.

often accuse their elders of having squandered family land assets by assigning land to 'outsiders'. Sharecropping is less conflictual, although the incomplete nature of these contracts has the potential to cause tensions at a later date.

In order to tackle these risks, the Ivorian Ministry of Agriculture commissioned a study in 2008 to propose a mechanism for formalising rural land contracts in writing.⁴¹ Generic model contracts for formalising sale-purchase, sharecropping and rental agreements were produced, with two types of contract for each transaction: one for pre-certification situations and the other for post-certification, as the law of 1998 only recognises the right to transfer full or partial land rights to holders of land certificates. These model contracts contained specific clauses covering the most common causes of conflict (the nature and duration of the transaction, each party's obligations, etc.). They were designed to be (i) adapted by the sub-prefectoral local authorities according to each actor's specific situation and needs, (ii) supplemented by minutes of a family council meeting authorising the transaction, and (iii) accompanied by topographic surveys showing the parcel boundaries for medium- and long-term transactions.

Despite the study recommendations, the Ministry of Agriculture only disseminated the post-certification models, justifying the decision to limit the formalisation of transactions to certified parcels on the grounds that the administration could not validate transactions involving rights that were not legally defined. Certification is supposed to be a long-term exercise, but has been derailed by a legal purism that condemns purchasers of uncertified parcels to potential insecurity. Transactions can only be secured through various types of local practice: 'being a good incomer', only entering into transactions with trusted individuals, organising contracts so that certain difficulties can be avoided, and using documentation to secure contracts. ■

II. Colin J.-P., 2008, *Etude sur la location et les ventes de terre rurales en Côte d'Ivoire. Rapport 1. Diagnostic des pratiques*, Abidjan, Republic of Côte d'Ivoire, Ministry of Agriculture/European Union delegation, 143 p.

● Land tax

Most formalisation policies rely on external funding for their implementation. This raises questions about the financial viability of the process, as the revenues generated by formalisation (especially alternative forms of formalisation) cannot cover the land services' operating costs if they keep certification fees low enough to be affordable for users. The powers transferred to local authorities are not always accompanied by sufficient and sustained funding to enable them to fulfil their new responsibilities.

Introducing a land tax is currently seen as a way of helping perpetuate the reforms and reducing their dependence on external funding. Advocates of the reform in Madagascar are now switching to new operations that combine systematic tax censuses and group certification in order to diversify the activities of the local land services, encourage local development and ultimately reduce their financial dependence on the State and donors.⁴⁰

Another argument in favour of land taxes is that they encourage people to register changes in the status of their parcels, as it is in the vendors' interest to register a sale in order

40. Burnod P., Andrianirina and Ravelomanantsoa, 2013, 'The progress and limitations of decentralisation and land certification in Madagascar', 'Land Tenure and Development' Technical Committee study day on 'Formalising rights and obligations', Nogent-sur-Marne.

to avoid paying further tax on the land.⁴¹ It is worth remembering that the Napoleonic land register was introduced to make land tax more equitable, by giving it an objectivised foundation based on the value of the land in question rather than affirming rights to it. Introducing a moderate annual land tax would help finance land management operations and limit the fees for registering changes (which encourage the under-declaration of prices and informal sales).

Land tax can also be used as a strategy to consolidate property rights: when it has to be paid by the proprietor, anyone who can prove that they have paid land tax for a parcel over a certain period can be recognised as its owner. This was one of the reasons why urban land registers were introduced in Benin, in addition to generating tax revenues for the communes. Formalising land transactions and introducing land taxes can provide the foundations for rapid nationwide land reforms by making it possible to recognise and secure local land rights, especially in urban areas.⁴² ●

BACK TO BASICS WITH THE URBAN LAND REGISTER IN BENIN^I

The Urban Land Registration (ULR) system was conceived in Cotonou in the mid-1990s to address a practical issue: how to generate the revenue needed to set up and equip a municipal authority with the minimum resources required to act (even if this only involves installing and maintaining a road system). In a country with no oil or mining wealth it was impossible to tax exports; and in a city that derives most of its prosperity from a port that acts as an outlet for neighbouring Nigeria, it would have been counter-productive to raise taxes on imports. Raising income tax was also out of the question due to the high level of informal activity.

The only other – and easiest – option was a tax on land and property, whose values were fairly high. It was impossible to tax changes in the status of land as they were rarely declared, so attention turned to the annual tax paid by property owners. The next step was to set up a land register to establish the tax base, but this was problematic as there was already one in place – although it was largely virtual, as very few plots were registered and it was never updated. So the idea was to create a land register without advertising the fact and without using surveyors.

The capital of Benin, Cotonou has a very simple orthogonal plan, like many cities that were built during the colonial period. All parcels are rectangular and enclosed, but not necessarily demarcated. So all that was needed was to give the city's tax officials tape measures and ask them to roughly measure the length and breadth of each parcel as they went about collecting taxes. This would indicate how much land the occupants had without verifying their title to it. Most occupants do not own the plot they live on.

The strength of this system lies in its great simplicity. Instead of starting with the territory and carefully mapping and registering plot boundaries and property rights with the administration, the process begins by recording each parcel and its occupant. All that's needed to create an 'urban land register' is an Excel sheet on a laptop computer. And without knowing it we have gone back to the roots of the land register, whose etymology denotes a list (of taxpayers) not a map. ■

I. Box prepared by Joseph Comby (*Etudes foncières*).

41. While taxing land transactions (registration fees) would have the opposite effect.

42. Comby J., 2007, 'Reconnaître et sécuriser la propriété coutumière moderne', *Etudes foncières*, vol. 128, pp. 38-44.

CHAPTER 4

Inclusive formalisation policies present considerable challenges

The foregoing analysis clearly shows that policies to formalise land rights can serve very different political and economic objectives. Their economic and social impacts are highly contextual, and depend on the political choices (especially regarding the diversity of existing rights) and strategic and methodological decisions that shape the policy and its implementation.

These choices are themselves determined by the economic and political issues that formalisation raises at various levels (the State's political will to maintain or transform power relations and local inequalities, the administration's willingness to reform itself, professionals' capacity to change, etc.).

These elements of the political economy explain why many formalisation policies reproduce and sometimes exacerbate pre-existing rationales of exclusion; and why formalisation operations are sometimes blocked, or limited to areas where there are no major issues at stake.⁴³ This is not to say that it is impossible to have inclusive formalisation policies – rather, that certain political and methodological conditions need to be in place in order for them to succeed.

Six key elements of effective, inclusive and sustainable formalisation policies

Designing and implementing inclusive formalisation policies constitute an extremely demanding process that depends on a whole set of political, institutional, technical and financial parameters. These are rarely already in place, and need to be established before – or in some cases in parallel with – formalisation. There are six key points that should be borne in mind when considering formalisation policies.

- > Formalisation policies are clearly not an easy option, given that formalisation is not a panacea, the process is beset with pitfalls, the conditions for success are fairly restrictive, and the risks of negative effects far from negligible. In-depth reflection and discussion are needed ahead of the process to consider the opportunities for formalisation, its social purpose, consistency with other policies (especially economic policy) and the conditions for success. The reality, forms and causes of tenure insecurity and conflict, the functionality of the land administration, relations between the State and its citizens, what is driving productivity, and constraints to investment all need to be carefully analysed. There are no obvious choices: deciding how formalisation policies will be implemented

43. Biddulph R., 2011, 'Tenure Security Interventions in Cambodia: Testing Bebbington's approach to development geography', *Geografiska Annaler. Series B, Human Geography*, vol. 93 n° 3, pp. 223-236.

involves exploring different options and alternatives. And these reflections should not be limited to discussions between 'experts' or professionals in the sector. The social issues at stake require broader debate and reflection involving all the actors concerned, especially those at the grassroots level.

- > In settings characterised by a plurality of norms and authorities, the priority is to reconcile legality and legitimacy with clear legal recognition of established rights, whatever their origin (customary or statutory). It is not a matter of reverting to original 'traditional' rights, but of finding links, interactions between current local practices and regulations and statutory law, giving local land systems some level of legal recognition that takes account of their hybrid or mixed nature, and facilitates their adaptation. This means finding appropriate legal forms, formulating workable responses to articulate these different legal statuses within a coherent legal and administrative framework, and addressing the issues and spatial inequalities this may create. Formalisation is a particularly urgent and sensitive issue when there are no effective local regulations, where tenure is highly insecure, and in post-conflict situations. In such cases, clear policies regarding the type of legitimate rights and mechanisms for mediation and conflict resolution are a priority, as formalisation can help stabilise agreements as well as the outcomes of mediation and arbitration processes.
- > Successful formalisation policies need clear support from government, people, and the land administration and professionals in the sector. They require consistent sectoral policies, a clear strategy on the administration of formalised rights, and effective and viable land administration mechanisms. Building political consensus on formalisation and its objectives – or at least building enough political momentum to overcome institutional blockages, corporate interests and the machinations of those who take advantage of ambiguity and confusion – is a very important precondition for success.
- > Once the policy options have been identified, it is important to develop a realistic implementation strategy that takes account of the primary need to establish effective and transparent land governance and administration of the registered rights. It is often assumed that a reform is complete when the policy has been defined and the laws promulgated, with insufficient consideration given to the question of operational strategies. Building an institutional structure capable of enacting a reform is a huge challenge. It involves creating new powers, skills and functions to implement, monitor, support and facilitate mechanisms to register rights; putting in place a body to steer the process that combines political vision with operational capacity, and works fast enough to keep the process going and maintain political support without succumbing to pressure to rush things.
- > Even the best thought-out formalisation policies will encounter problems. Obstacles to their progress cannot always be anticipated, and certain legal or regulatory changes may be necessary as they proceed. Survey and formalisation procedures take time to establish, and will need to be adapted for different settings. Policies and their instruments are developed and refined along the way. There are many lessons to be learned, and this takes time, as does developing the capacity to monitor and adapt the process. Adapting and implementing effective procedures often involve phases of experimentation and learning. And in order to proceed on a sound basis, it is important to 'learn to be effective before learning how to grow',⁴⁴ while avoiding getting bogged down in the detail at micro-local levels.

- > It is essential to think about the institutional and financial viability of land administration mechanisms (in both the State services and decentralised bodies) from the outset, taking account of the trade-offs between proximity (which requires more teams) and cost. International aid cannot continue to support land information systems in the long term, as they are a public service that serves several functions. It often cannot be solely funded by users, so it is important to think about the State's budgetary commitment and how it will be financed. Land tax is one option that should be carefully considered.

In an ideal world, all these factors would be considered at the beginning of the process. In reality, however, it is very hard to do so. Public action is never linear and is always subject to multiple constraints, from political injunctions and power relations to financial pressures and difficulties with implementation. Reforms develop as they progress and therefore need to be clearly conceived with a strategy and timeframe that can accommodate these challenges, so that the desire to proceed quickly does not undermine efforts to create the conditions to make the reforms viable.

Some pointers for successful formalisation policies

- **First address the legal and procedural inconsistencies that create insecure tenure**

It is possible to make significant progress in securing land tenure before embarking on an ambitious reform process.

This can be done by removing legal provisions that encourage abuses of power and/or dispossession, and nationwide application of the following measures to help reduce tenure insecurity:

- > eliminate opportunities for the State to grant itself rights that it has not already obtained and negotiated at the local level;
- > ensure that social recognition of rights is central to rights registration procedures;
- > where relevant, question the principle of assumed State ownership, monitor the way that state agents use this principle, and strengthen the security of local land rights on State lands;
- > regulate land markets and frame the structure of land (limit plot sizes, introduce measures to tax large holdings, etc.);
- > explicitly recognise private land transaction contracts and give them an institutional framework;
- > ensure that all actors have access to legislative texts, and know their rights and responsibilities;
- > strengthen arbitration mechanisms and make local conciliation mandatory before involving judicial or state institutions, etc.

THE RURAL LAND REFORM IN BURKINA FASO, BASED ON LIMITED STATE OWNERSHIP, RECOGNISED LOCAL RIGHTS AND CONCILIATION¹

In Burkina Faso the National Rural Land Security Policy (PNSFMR, Decree n° 2007-610), the Agrarian and Land Reform (RAF, Law 034-2012) and Law 034-2009 on the rural land regime introduced four innovations in legislation that take greater account of the characteristics of rural land tenure and have helped incorporate it into the regulatory framework.

They establish the co-existence of the State's public and private lands, local government land and individual land holdings, and oblige all actors to prove their possession against third party claims through occupation, productive use or legally recognised titles. This new legislation abolished the provisions of the 1984 RAF, which gave the State control of land by creating a national land reserve composed of all the land and property in the country, and abolished private property rights in favour of State ownership of the means of production (this 1984 version had already been reviewed in 1991 and 1996 to allow the State to use registration procedures to assign its private land to individuals and local governments).

Laws 034-2009 and 034-2012 make provisions for procedures and documents that recognise local practices and land rights. Most notably, they introduced rural land certificates (APFRs), which are issued after a public, multi-party procedure involving land holders and customary and municipal officials; and loan agreements for rural land that allow borrowers and lenders to secure their privately negotiated clauses and arrangements.

Another major innovation was the possibility of registering collective land rights. Most rural land in Burkina Faso is part of a family holding, which may include separate individual holdings. The introduction of individual and collective APFRs made it possible to give this type of local land right a legal status.

The provisions in these texts also stipulated that attempts should be made to resolve land disputes through conciliation before taking them to court. They recognised and structured the various means of recourse and established a hierarchy of jurisdictions. All disputes should initially be taken to the village land conciliation commissions (CCFV), which document the outcome of their proceedings. Cases can only go to court when one of the parties concerned provides written evidence that the CCFV was unable to resolve the dispute. ■

I. Box prepared by Peter Hochet (Laboratoire Citoyennetés) and Jean-Pierre Jacob (IHEID).

● **Take the time to initiate genuinely inclusive stakeholder debates**

Nowadays, all policies claim to be 'participatory' and involve numerous workshops and seminars before they are adopted. Yet the term 'participation' covers a very wide range of realities. Representation is a complex issue, as local actors' ability to express themselves and get their views heard varies greatly and is often very limited, and local actors are frequently used to promote interests other than their own. Workshops are often called at very short notice, documents are not available in advance, and participants who are invited to represent particular groups of actors have no time to prepare within their organisation and are thus unable to present a shared viewpoint. More often than not, 'participation' is used to justify

decisions that have already been made rather than reflecting a desire for open debate about the possible policy options.

When organising debates particular care needs to be taken to ensure that they are not hijacked, and to enable different groups of actors to contribute meaningfully to the discussions (especially community representatives). This is essential in order to build shared understanding of the issues and negotiate consensus. Producer and community groups and civil society organisations often need specific information and training to enable them to understand the issues, establish their position and hold their own in debates against experts and State agents and officials.

There are various stages in the process of debate: consultation (informing participants and listening to their concerns), deliberation (identifying points of consensus and divergence) and validation (by the authorities). These processes take time, often several years, to allow ideas to mature and to build compromise and social consensus. Particular care is needed when designing and steering consultation processes and organising and running debates.⁴⁵

USING MULTI-STAKEHOLDER PUBLIC DEBATES TO FORMULATE A NATIONAL POLICY TO SECURE RURAL LANDS IN BURKINA FASO¹

In the early 2000s the Government of Burkina Faso started the process of formulating a national policy to secure rural lands, using a participatory process with wide-ranging debates between different stakeholder groups. Originally intended to last for eight months, it actually took nearly three years (December 2004 to October 2007) for the National Committee for Rural Land Tenure Security (CNSFMR) to complete the process. Despite strong political support from the Ministry of Agriculture, it proceeded in fits and starts due to various political pressures and financial constraints. It progressed in several stages: (i) assessment by a team of experts using lessons learned from past experience and the current realities of tenure insecurity in the country to establish the initial policy guidelines, (ii) organising consultations with different types of actor, (iii) identifying points of contention and preparing the first draft of the policy document, (iv) holding regional workshops and a national forum to debate and reconcile the different positions.

The process endeavoured to combine effectiveness (negotiating with competent actors, improving policy performance) with legitimacy (securing broad public support for the proposed policies), constantly striving to establish a shared diagnosis and compromise between heterogeneous actors with different and often divergent interests.

Although hundreds of people attended the meetings, it was decided to work with a limited number of actors who were supposed to represent the main stakeholders rather than hold open forums where everyone was invited to participate. This decision was endorsed by the CNSFMR secretariat and team of experts who supported the process, who were highly critical of the way that workshops were usually organised. They were hoping for a balanced, rigorous process in which invitations and basic [cont.]

I. Box prepared by Daniel Thiéba (Grefco, Burkina Faso). See Lavigne Delville P. and Thieba D., 2015, 'Débat public et production des politiques publiques au Burkina Faso. La politique nationale de sécurisation foncière', *Participations*, vol. 11 n° 1.

45. Zémor P., 2003, *Pour un meilleur débat public*, Coll. Bibliothèque du citoyen, Paris, Presses de Sciences-Po.

information would be circulated well in advance of meetings, debates would be well run and equitable, and discussions rigorously synthesised. Despite certain shortcomings in the process, the different groups of actors (farmer organisations, chiefdoms, women, agri-businessmen, etc.) did find it useful and were able to put their views across.

Farmer organisations received specific support from the Groupe de recherche et d'action sur le foncier (Graf), as requested by the Burkina Federation of Agricultural Professionals (Fepab). These training and information activities helped them understand and decode the content of the documents presented for discussion (draft policy document, etc.), discuss the issues and controversies in the light of their concerns, and develop a shared position. As a result, farmer organisations were able to appropriate and contribute to a more balanced debate, and to a policy document that took greater account of family farmers' concerns. ■

Experience has shown that this kind of debate tends to work better when efforts have already been made to consider and analyse land issues and test options outside 'expert' circles. Other favourable factors include the emergence of networks of actors who share the same vision of the world and a similar reading of land-related problems, the existence of crosscutting forums for exchange to progressively socialise the idea of reform, and political support from a strong leadership that can facilitate inter-ministerial and multi-stakeholder debate on the topic.

MOBILIZING CIVIL SOCIETY: A KEY ELEMENT OF INCLUSIVE REFORM¹

In 2008, farmer organisations and civil society groups in Senegal set up a network to discuss the issue of land grabbing. The Senegalese authorities responded to the food crises and riots of 2008 with a series of ambitious national agricultural programmes (GOANA, Reva plan, etc.), but instead of strengthening the capacities of the family farms responsible for most national agricultural production in order to alleviate rural poverty, these programmes enabled private national and foreign investors to access vast swathes of land for agricultural and agro-industrial (biofuel) projects and tourism. As land became a key issue for civil society groups facing the risk of wide-scale dispossession of rural lands, national organisations working specifically on land or more general food security issues came together in an informal collective: le Cadre de réflexion et d'action sur le foncier au Sénégal (Crafs).

Crafs initially focused on monitoring and supporting local people affected by these projects, but soon started thinking more broadly about the land reform. It was supported by several committed experts and informed by longstanding work by farmer organisations, particularly by CNCR, which had been developing farmers' proposals for the land reform since the early 2000s. *[cont.]*

I. Box prepared by Amel Benkahla (Gret) and Sidy Mohamed Seck (Université Gaston Berger, Senegal) with support from stakeholders in the Cadre de réflexion et d'action sur le foncier au Sénégal (Crafs).

A number of civil society groups (CNCR, Enda, ActionAid, Ipar, Congad, Cicodev, etc.) are currently working on these issues, contributing to public debate and putting the land reform on the agenda. In-depth reflection on the issues raised by the reform and an approach that uses local practices to inform reflection has enabled farmer organisations and civil society groups to act as legitimate interlocutors of the State. They are now listened to and consulted by the National Commission for Land Reform (CNRF), which the President of the Republic has appointed to steer the process using a *'bottom-up approach that involves local people and brings together different groups of actors to ensure that the future land policy is widely appropriated.'* ■

● **Ground these debates in solid analysis that goes beyond disciplinary divisions and vested interests**

Defining a policy involves assessing the problems that need to be resolved and determining how best to address these challenges. Agreement needs to be reached on the issues to be tackled and how they will be framed before it is possible to start thinking about how to deal with them. Debates are often blocked by professional cultures, an inability to move beyond standard thinking on land matters, problematic terminology that creates misunderstandings, narrow legal views that cannot see beyond the existing legal framework, and the existence of strong vested and corporate interests. Land is a complex subject that crosses into many different professions and sectors, and the way that problems are presented and solutions are considered is shaped by each country's territorial and political history, the education and position of the actors concerned, and the type of technical and financial partners involved.

Finding innovative solutions requires the power to question logics that seem to be universal, but which are actually shaped by specific histories. A good deal of effort is often needed to educate actors at every level in order to dispel received ideas and misconceptions, and create a deeper shared understanding of the realities of land matters and forms of insecurity. Mobilizing current knowledge, building on sound analyses, questioning the provenance of existing mechanisms and legal frameworks, exploring current legal resources (national and international), learning about situations in other countries and the choices they have made, and taking the time to test options before making a final decision on policy guidelines are all tools that can be used to open up a crosscutting debate, and encourage all concerned to seek specific solutions that are appropriate for the particular social, economic, institutional and political situations in the country concerned.

In situations where it is difficult or impossible to deal with the situation or take account of certain factors under existing land laws, it can be useful to explore the resources offered by other legal traditions, such as Islamic law, which centres on the 'vivification' of land; medieval Roman law for partial sales or overlapping rights; the application of the Civil Code in France; Common Law, and so on. It can also be instructive to look at international frameworks for the formalisation of land rights, as most have been signed by States and are thus part of the existing legal framework. Compulsory or voluntary, they all constitute resources that can help inform the debate in various countries.

INTERNATIONAL FRAMEWORKS FOR FORMALISING LAND RIGHTS: HINDRANCE, HELP OR OPPORTUNITY?!

Land matters are increasingly framed by international regulations. Some are supposed to be binding (ILO Conventions 107 and 169 on the Rights of Indigenous Peoples), others are declarative (Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests approved by the Committee on World Food Security), and some are still in the process of being formulated (draft Declaration on the Rights of Peasants and Other People Working in Rural Areas prepared by the United Nations Human Rights Council).

There is no denying that progress has been made in terms of increasing recognition of 'legitimate' rights in international land law. But this attention to customary rights is limited by numerous references to national frameworks ('rights', 'legal', 'law' or 'legislation') and the lack of space given to innovative alternative means of securing land rights.

Apart from a recent conception of nature and land supported by the United Nations, there is no single common founding vision of the rights to which they are subject. Various concepts of private and individual property are recognised (Article 26 of the United Nations Declaration on the Rights of Indigenous peoples), but they are regarded as being lower down the hierarchy of the vision presented by neo-liberal economic theory.

It should also be remembered that States comply with international law on a voluntary basis, and that this law still offers no effective recourse for individuals or groups seeking to secure their rights to land and natural resources.

Any further developments in this respect require a political will for change among the States that promulgate international laws, which in turn needs strong citizen support for progress. If citizens still seem to be able to 'play' with the diversity of norms, they will have the same protection for their land rights as the actors who benefit from the absence of genuine international justice in this domain. ■

I. Box prepared by Philippe Karpe (Cirad) and Etienne Le Roy.

● Legal reform should be regarded as both an issue and a means to an end, with the emphasis on effective policies

Inclusive policies usually entail major reform of the land legislation in order to introduce new legal categories, revise institutional procedures or mechanisms, and occasionally challenge the categories on which previous texts were based. This presents specific difficulties, as the law should reflect political choices and take account of social realities while simultaneously seeking to change them in a certain way. It should be short, legible and deal with multiple situations, raising the question of whether there be a single land law or a set of guidelines and texts covering specific sectors (urban, rural, forests, etc.).

While the law needs to be rigorous, it should not be confined by existing legal concepts. There are certain key points in the process when conflicting readings and interests can derail the political project and legalism can block innovations – when the underlying principles and necessary compromises are defined, when these principles are put into legal form, and when the reform goes to a Parliamentary vote. It is always worth preparing the ground by informing MPs before the vote takes place.

It is also important to remember that reforms are not an end in themselves. Reforming the law is often a necessary, but by no means sufficient, condition for effective policies, and the recasting of legislation should be seen as a means of putting political choices into practice so that it does not get bogged down in routine legal procedures.

Reforms are often undermined by incomplete (and thus unenforceable) laws. To be applicable, a law should contain a set of implementing measures and instruments.⁴⁶ It is also worth thinking about the new legal and institutional framework and how it will translate into a set of laws, decrees and regulations, to ensure that they are coherent and avoid decrees that drag on or are simply never published.

Policies are shaped by the actors who design and implement them, but the general population also needs to know about new policies and understand how they will be affected by them. They should be able to understand the main aspects of new policies, and have easy access to clear and comprehensible information on their main aims and practical procedures. Land administration agents, elected local officials, sectoral professionals, judges, etc. need to be trained and equipped to implement new policies, and learn to change their views and practices. Civil society groups may keep an eye on what happens with the law, but they are less likely to scrutinise the preparation of decrees, procedures and costings, and this can result in laws being hijacked and used to serve the interests of certain groups. The more innovative the law, the more information and education is needed, along with monitoring of and support for the actors responsible for its implementation.

● **Where there is a plurality of norms and laws, this needs to be taken into account and land governance institutions shaped accordingly**

Tenure cannot be secured without the rule of law. The plurality of norms is a lasting reality, and in many regions of the world local norms still provide most of the population with a framework for securing tenure, even though they may be inequalitarian.

TAKING ACCOUNT OF PLURAL NORMS AND USES: THE RURAL CODE IN NIGER^I

The guidelines for Niger's Rural Code are set out in Order N° 93-015, which was adopted after a wide-ranging national consultation. The Rural Code aims to incorporate certain aspects of customary management into statutory law, so that customary land rights are recognised as having equal status to land titles,^{II} farmers and herders can receive rights registration certificates, herders' priority rights to their 'home territories' are recognised, and pastures are regarded as 'shared spaces' on public State land and are thus theoretically protected from clearance. Rights are recorded in 'rural [cont.]

I. Box prepared by Florence Bron (Maedi).

II. 'Rights to natural resources are afforded equal protection, whether they are customary or statutory' (Rural Code, Article 5).

46. Ouattara B. F., 2011, *L'inachèvement juridique et institutionnel et ses conséquences sur le développement*, Etudes Recit n° 33, Ouagadougou, Laboratoire Citoyennetés. Griffiths J., 1997, 'Une législation efficace: une approche comparative', in Darbon D. and du Bois de Gaudusson J., ed., *La création du droit en Afrique*, Paris, Karthala, pp. 41-72.

registers' that progressively document all registered land and certificates. The mechanism for the Rural Code thus aims to promote land management that combines customary logic with statutory law, ensures that different land uses can coexist, and secures all land users' rights.

The Rural Code is based on an institutional mechanism that is supported by the territorial administration, which has land management structures with specific roles at every administrative level. At the communal and departmental level, there are Land Commissions (Cofos), collegiate institutions that bring together all land actors, from the administrative and customary authorities to the technical services and rural producers. Niger is one of the few countries in francophone Africa where the chiefdoms have a recognised role in the Constitution. There was lively debate about the place of the traditional authorities in the mechanism for the Rural Code throughout the formulation of Order N° 93-015, as some people felt that they should no longer be involved in land management, while others maintained that they were essential to it. Traditional authorities 'with a particular interest in the agenda' will eventually be included as members of Cofos; and an Order adopted in 2005 allowed for the creation of community-based Cofos (Cofob) at the village and tribal level, with village and tribal chiefs as their presidents.

The composition of the Cofos should help better regulate the plurality of norms and counterbalance the chiefdoms' influence in land management by creating spaces for dialogue in certain localities. However, at the local level land is often managed by traditional chiefs rather than on a consultative basis. The administrative authorities and technical services are not members of Cofos, which are responsible for formalising rights and transactions. In addition to this, Cofos rarely meet, especially at the local level, partly because they lack the resources and skills to do so, but also because of the social power wielded by the customary authorities. This, and the poor mechanisms for monitoring and controlling Cofos, can lead to abuses, especially the private appropriation of pastoral lands by local farmers or private investors.

These operational problems with Cofos can make it hard to address inconsistencies between the Rural Code and customary practices in a consensual and collegiate manner. For example, the departmental land commissions are responsible for securing common resources (uncultivated land reserved for livestock), but are usually externally funded and have very little involvement in managing these resources. This is done by the traditional chiefs. Pressure on land leads to conflicts between the herders who have the right to use these spaces and the traditional authorities who have the power to allocate them for agricultural use. These conflicting land rights exist in both customary practice and in the texts of the Rural Code, and the land commissions are often powerless to regulate the resulting conflicts.

Although some local land rights have been protected, certain weaknesses in the mechanism can create insecurity for rural producers, and it can still be difficult to regulate the plurality of norms at the local level. ■

In situations where there is a multiplicity of norms and the local authorities still play a role in regulating land matters, the issue is not simply defining effective land regulation mechanisms that secure tenure, but also making them work by regulating the plurality of norms. This requires articulation between different levels of governance and/or the introduction of hybrid mechanisms that will help arbitrate and facilitate a gradual transition between statutory and local norms.

● Propose a range of options that reflect and accommodate diverse socio-land situations

Depending on the context, formalising transactions, recognising local (documented and undocumented) practices to secure tenure, introducing land taxes as a means of securing holders' rights, and formalising the rules for using and managing land and resources may be options worth pursuing in addition to or instead of formalising rights.

FORMALISING DIFFERENT LAND USES AND REGULATIONS: LAND USE PLANS (LUP) IN SENEGAL^I

Land use plans (LUP) were introduced in Senegal in the 1990s^{II} as instruments to enable local governments to manage land and plan hydro-agricultural developments. They were first tested in the rural community of Ross-Béthio in the River Senegal delta, to help the local government better control unregulated land use that had led to a huge increase in land allocations and a growing number of conflicts between farmers and herders. LUPs were introduced as part of a learning process for all actors involved in decentralisation, including the State technical services. Resources and spaces that were key to the survival and development of each activity (water points, wetlands, livestock routes, etc.) were identified, and under the auspices of the rural council rules that would help secure, support and facilitate the coexistence of different rural activities – and thus avoid conflicts between herders and farmers over access to collective resources (water, access routes) – were defined using participatory mapping. All actors in the territory agreed on the guidelines, rules and maps that were then used as part of a local development programme.

Building on this initial experience, every local government in the valley prepared LUPs with support from the Senegal River Delta development and exploitation company (SAED) and the French Cooperation. All 43 local governments on the left bank of the river now have an LUP^{III} containing:

- > a general description of the rural community (physical, human and socio-economic data, etc.);
- > various maps showing the general status of the rural community in terms of the river system, soil capabilities, inhabited areas, socio-sanitary and socio-economic infrastructures (health posts, schools, markets, stores, boreholes, landing sites for fishing boats, etc.), land occupancy by agriculture (irrigated, flood recession and rainfed), livestock rearing, classified forests, etc., with tables showing the amounts of land concerned in each zone;
- > maps of priority natural resource use in different areas. All LUPs along the river cover relations between agriculture and livestock rearing. Some agro-pastoral areas are prioritised for agricultural use (Zapa) and others for pastoral use (Zape). Depending on the rural community, some LUPs include other types of zoning for exclusively pastoral use (ZP), or for fishing, tourism, etc; *[cont.]*

I. Box prepared by Sidy Mohamed Seck (Université Gaston Berger, Senegal) and Patrick d'Aquino (Cirad).

II. Master Plan for the Integrated Development of the Left Bank of the River Senegal (PDRG) in 1994, Local Government Code in 1996.

III. The process has been extended with recent financial assistance from the Rural communities support programme in the River Senegal Valley (PACR-VFS) funded by AFD.

- > land and natural resource management rules and sanctions to regulate land occupancy and resource use;
- > a local mechanism for applying the LUP and monitoring its implementation (zone and technical committees).

The procedure makes it possible to transfer the skills needed for decentralised land management to non-specialist local actors (elected local officials, local government staff and other local resource persons) in the space of a few months. These local actors can then operate autonomously and even update the guidelines, rules and maps. The process used to develop the tools helps clarify each actor's role and responsibilities in managing land, strengthen partnerships and reinforce the local governments' legitimacy in land management. To a certain extent, it also helps promote local democracy by involving local people and actors in identifying different zones and defining the rules for using and managing natural resources. It also restores pastoral livestock rearing as a recognised form of land occupancy and use.

However, experience has shown that LUPs are not always systematically applied. This is not so much due to the tool itself as to a lack of resources to intervene and monitor activities, lack of stakeholder training and unwillingness to apply sanctions when rules are broken. In addition to this, none of the local governments have a dedicated budget to cover the operating costs of their LUP. ■

One of the challenges when developing land policies is proposing a national framework that can be applied right across the country. One solution could be to have an open and evolving range of flexible, interactive options with different legal statuses and mechanisms for securing rights, ranging from simple mechanisms for formalising transactions and mediating conflicts to procedures for issuing accurate and timely titles.

CERTIFICATION IN MADAGASCAR: A WAY OF VALIDATING RIGHTS THAT ADDS TO THE RANGE OF PRACTICES USED TO SECURE RIGHTS¹

Since 2005, the laws underpinning the reform (Laws 2005-019 and 2006-031) have introduced the assumption of untitled private property in order to legally recognise local land rights and thus limit State ownership. Like titles, certification only formalises private ownership by one or more individuals; but it differs from land titles in that it only registers existing, socially validated property rights. Demand for certificates has been much lower than the advocates of the reform anticipated – each commune had issued an average of between 38 and 261 certificates a year by the end of 2014. This lack of social demand for legal formalisation can be explained by two main factors:

- > insecurity of tenure in rural areas is much less prevalent than expected. On the one hand, only a very small number of plots of land are contested; and on the other, while many households feel that their rights are not fully secured in the long [cont.]

I. Box prepared by Perrine Burnod (Cirad), Rivo Andrianirina Ratsialonana (Observatoire du foncier) and Zo Ravelomanantsoa (Programme national foncier).

term, few worry about them being contested in the short term. Households use a range of practices to secure tenure, combining them according to the characteristics of the plots of land (origin of the rights, agricultural quality, potential challengers) and territories concerned;

- > the main method used to secure land in rural areas is based on social recognition by neighbours and local institutions. Households use informal documents ('*petits papiers*') to secure transfers of rights and private contracts, to validate sales, confirm legacies or register productive land use. Few people obtain certificates to legally formalise their rights, even in communes that have a land office.

A study^{II} on the perceptions and effects of land certification covering 1,860 households in nine communes with a land office showed that only 5.5% of the 7,697 parcels concerned had certificates, and 0.5 % had titles, while 60% used '*petits papiers*', 23% relied on tax receipts, and 11% had no documents at all.

Those households that have obtained certificates are very varied in terms of their wealth, level of education, origin and the remoteness of their village. Certification is not the preserve of the elite, but one of a number of very specific procedures for securing rights in order to reaffirm property rights if there is a concrete threat to them, secure the children's inheritance, or in response to an information campaign, etc. Certificates have considerable advantages over land titles as they are quicker and cheaper to obtain, but are less flexible, accessible and 'established' than '*petits papiers*'. Some users prefer them because they are cheaper (costing about €1 compared with €11 for a certificate), because of the type of authority involved (family, head of *fokontany*^{III}) and the fact that they formalise transactions rather than rights. Some land offices demand *petits papiers* for the certification records, which tends to make rights holders feel that they are useful. The reform would ultimately be more effective if it recognised or at least drew on some of these practices by (i) formalising transactions and the origin of the rights rather than ownership, and (ii) focusing on land governance rather than formalising land rights. ■

II. See Burnod P., Andrianirina N., Andrianirina Ratsialonana R., Boue C., Gubert F., Rabeantoandro R., Rakoto-Tiana N., Ratovoariny R., Vaillant J., 2014. *La certification foncière au niveau des ménages ruraux à Madagascar. Perception et effets: Situation en 2011*. Land Observatory, 137 p. www.observatoire-foncier.mg/downloads/16-Rapport-PECF-version_Final2.pdf.

III. Traditional Malagasy village.

It is not a matter of choosing one option over another, but of offering a broader range of solutions that meet the needs of different categories of land user (producers, tenants, owners, investors) and can accommodate changing socio-land situations and requirements. Over time, the options in one area can be supplemented and the administration of rights transferred to the State land services.

● Promote accessible and affordable local mechanisms

Technically sophisticated mechanisms and interventions by specialist staff are not always appropriate. Systematic reliance on professionals in the sector (surveyors, solicitors) may ensure that procedures are rigorous, but these professionals are not always readily available

across the country, and their services are often unaffordable for local people and excessive in relation to the value of the goods concerned.

Particular care needs to be taken in defining procedures and selecting the actors who intervene at various stages to formalise and administer land rights, in order to establish mechanisms that are both reliable and physically and financially accessible. Combining rigour with simplicity requires local mechanisms that accommodate socially recognised rights and offer the possibility of recourse, rather than a sophisticated bureaucratic procedure involving multiple stages and numerous documents. Procedures can be made more viable by making the best use of locally available human resources and technologies, and using professionals to train and educate rather than intervene directly themselves.

Intermediate levels of governance between the State and its individual citizens are extremely important. They are mainly but not exclusively decentralised (village, neighbourhood, etc.), and involve authority systems that are often closer to local people and seen as more legitimate by them. Where financial reasons make it impossible or undesirable to have local land services, adopt the principle of subsidiarity and work with the different bodies and arbitrating authorities that already exist at the local level.

In order to avoid standardisation, mechanisms need to stay flexible and open to allow the actors responsible for their implementation to take account of local specificities and forms of organisation. Monitoring and control mechanisms should be put in place to prevent this subsidiarity from leading to unreliable or nepotistic practices, with plenty of support and training in the early years.

● **Formalisation should be a gradual process, with practices documented**

Huge projects to systematically formalise land rights can exacerbate existing problems. They take little account of the diversity of land tenure situations, often impede the progress of paperwork, and do not contribute to stable, reliable and sustainable land administration systems. The priority should be to establish and consolidate reliable and sustainable mechanisms for land governance and administration, and the pace of institutional reform should dictate the pace of formalisation operations, not the other way around.

Processes to formalise rights are more likely to succeed if they are progressive and voluntary. Systematic procedures are best limited to priority areas such as urban and peri-urban zones and areas affected by intense land pressure, active land markets, development projects, etc. In order to avoid leaving problems in other regions unresolved, a pragmatic and workable response could be to combine formalisation operations in priority areas with simple measures elsewhere (formalising transactions, strengthening mediation mechanisms).

An effective range of formalisation options will involve numerous technical and institutional innovations, and new tools and procedures that may not be entirely relevant or effective at the start of the process. Experimental phases combined with observational monitoring and evaluation systems are often essential before large-scale changes can be envisaged. Their relevance and duration will largely depend on the level of innovation and previous experiences in similar situations. ●

THE MADAGASCAR LAND OBSERVATORY: A TOOL FOR EVALUATING AND FORMULATING NATIONAL LAND POLICY^I

The first land observatory initiatives date back to the 1990s, although guidelines for establishing structures to observe land policies were not formalised until the 2000s.^{II} These observatories often focused on producing knowledge and analyses to feed into public debate and policy evaluation. Their institutional status varies: some are independent structures while others are attached to public institutions (as in Madagascar). They may be associated with universities or supported by civil society organisations (like the *Observatorios de Tierras* in Latin America), and focus more on warning systems or on helping decision-makers formulate and evaluate land policies.

The Land Observatory (LO) in Madagascar was created in 2007, as part of the land reform and in accordance with the recommendations of the land policy paper. It initially focused on the effects of decentralised land management, and then gradually broadened out into other themes such as urban land, large-scale land investments, territorial development, land governance, etc. Its institutional links with the ministry responsible for land gave it easy access to information and decision-makers and the legitimacy to lead public debate, but also increased the need for analytical objectivity in order to retain its influence.^{III} The fact that it has been dependent on external funding (from IFAD, AFD and the World Bank) for the last eight years raises questions about its economic viability.

The LO team has grown from two to six national consultants, staying small in order to keep its operations simple. Its actions are structured around four areas: producing analyses, discussing ideas, disseminating knowledge and supporting decision-making. The team conducts and commissions studies, working in conjunction with masters and PhD students and researchers (a researcher from Cirad has been attached to the observatory since its creation). Partnerships with national and international training and research institutions have enabled it to develop and refine certain themes, perspectives (anthropology) and methodologies (quantitative survey on household perceptions of the effects of land certification). This diverse work is facilitated by a network of different actors from international institutions, national civil society platforms, universities and research centres, public institutions and private actors. The observatory's continued existence despite certain financial difficulties has enabled it to develop and periodically monitor the progress of the land reform (changes in the number of land offices, effects of certification, number of investors, etc.).

The lack of permanent systems for relaying information means that it is sometimes easier to disseminate the LO's work (articles in journals, films, extended papers, academic articles, etc.) at the international level and in the capital than at the local level. However, materials are regularly published on the Internet (www.observatoire-foncier.mg), which helps maintain its profile and ensure a certain level of transparency.

The Observatory has gained national and international recognition, especially through its role piloting and conducting assessments for the reform and supporting the ongoing formulation of the new land policy. Its participation in national and international workshops has helped share and enrich the analyses and ideas presented to decision-makers. ■

I. Box prepared by Rivo Andrianirina Ratsialonana (Madagascar Land Observatory).

II. See in particular Section 6 of the African Union 'Framework and Guidelines on Land Policy in Africa'.

III. Particularly due to political or administrative interference in certain sensitive areas.

Conclusion

Urgent action is needed to respond to the huge challenges and threats faced by so-called 'developing' countries. The combined effects of strong demographic growth, escalating urbanisation and massive land accumulation are causing processes that lead to exclusion and poverty, and which carry serious social risks. These tensions and the politicisation of land are contributing to conflicts at the local and national level. The social cost of inaction on this issue cannot be ignored. But what is to be done? Could formalising land rights be a solution? And if it is, under what conditions?

Standard approaches based on the systematic formalisation of private property rights are now widely promoted, despite falling out of favour in the 1990s. These approaches are problematic on two counts. Firstly, land administrations do not have the capacity to cope with the increasing workload generated by formalisation: changes are not registered and land information systems rapidly become out of date, opening up new gaps between the law and the reality on the ground and creating new sources of conflict. Secondly, using a single model of formalisation in situations where land rights are not based on semi-private ownership will be hugely exclusive and generate limited economic benefits. The two key issues in policies that aim to secure land tenure are (i) determining what kind of rights will be recognised, and (ii) establishing reliable institutional mechanisms that are capable of providing lasting security of tenure and sustaining the administration of legally recognised rights. In addition to developing procedures to formalise rights to parcels, it is also important to use the diverse experiences, procedures and tools that now exist to consider how changes to these rights can be secured. Recognising and respecting diversity is crucial in designing and implementing inclusive policies to formalise rights. The reason why no new universally applicable and replicable 'model' has been developed is because this is an impossible task – diverse forms of land appropriation and governance call for differentiated responses that are adapted to the context, setting and political choices concerned.

This study has shown the importance of a measured response to the debates on land policies. Formalising rights is a major component of land policies, but it will not automatically improve security of tenure as legal documents are only useful if they are supported by reliable and accessible institutional mechanisms. Security of tenure is a political and institutional issue rather than a legal one, since it depends on the institutional capacity to define, recognise and protect land rights. Being able to get the State to recognise legitimately held land rights is a key step in securing tenure, provided the rights its recognises are meaningful for local people and registered and managed by reliable institutions. It is also important to remember that formalising rights can include or exclude certain groups and secure or weaken citizens' rights. It all depends on the context and underlying political will. Formalising land rights should never be regarded as a simple technical operation to survey boundaries. In contexts where there is a plurality of norms, as is frequently the case in developing countries, policies to formalise rights

need to carefully consider the kind of rights that are recognised and the type of institutions that are responsible for ensuring security of tenure, and thus the relationships between the State and the local authorities.

Decisions about the formalisation of previously 'informal' rights will reflect the ways that land rights and relationships between individuals, social groups and the State are perceived in any given society. Formalisation will not necessarily boost the economy, improve equity or resolve conflicts. Deciding whether or not to formalise rights is not something that should be left to experts and government officials – it should be discussed in wide-ranging debates that involve all actors with an interest in land matters, and which take account of the aspirations and interests of different social groups.

Experience has shown that it is extremely hard to make inclusive formalisation policies work. Successful formalisation requires a set of conditions that may need to be established before the policy is put in place or created as it is developed and implemented (by initiating policy debates, working on the legal framework, developing procedures and a wide range of options for securing tenure that are consistent with socio-land situations on the ground, promoting inexpensive local mechanisms and progressively implementing them across the country).

International partners can play an important role in supporting the formulation of inclusive and sustainable land policies, by adjusting their support to the maturity of the land policies in the country concerned, taking account of the pace of the processes they are funding, emphasising the importance of public debates and enabling civil society actors to participate in them, initiating and debating detailed empirical studies, ensuring that tools do not take precedence over political choices, encouraging local experimentation that prioritises local mechanisms to secure tenure, and ensuring that effective monitoring and evaluation systems are put in place and their findings discussed in public.

One of the most crucial issues in land policies is finding a way of achieving inclusive economic growth that not only offers income opportunities for a growing population, but also reduces the sources of conflict between different citizens. Land policies have a vital role to play on both fronts by securing people's land rights. Formalising rights is a key element of this aspect of land policies, but other land matters raise equally pressing economic and social concerns, such as the need to regulate private investments in land, consider the distribution of rights and tackle land inequalities. Land is just one element of the response to questions raised by the quest for inclusive economic growth. Development in many countries is hampered by modes of access to markets, price relations and access to inputs and technologies. If there are 'significant imperfections' in other dimensions of the economic environment, formalising private property rights and encouraging the land market will have very little positive impact on the productivity of family farming, and is highly likely to have a negative impact on equity. Therefore, land needs to be considered as part of an overall approach to development and to support for family farming in low and middle-income countries, which is vital in order to meet the challenges associated with food security and sustainable development. ●

FURTHER INFORMATION

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Formalising land rights in developing countries

At a time when many international institutions and development agencies are supporting the implementation of policies and programmes to formalise land rights, private investments in land are accelerating, and efforts to formulate principles to improve land governance and frame investments in the agricultural sector are increasing, it seemed appropriate for the French Cooperation to clarify its positions and identify concrete measures to translate them into action.

In response to a request from the French Ministry of Foreign Affairs and International Development (Maedi) and the French Development Agency (AFD), the 'Land Tenure and Development' Technical Committee initiated a wide-ranging process of reflection, coordinated by Maedi and AFD, to identify the conditions for relevant, sustainable and effective policies to formalise land rights. The objective was to propose a number of pointers to help the French Cooperation and its partners better understand the issues, look beyond the controversies and inform future strategies and practices. This work was based on an assessment of over 30 years of diverse experiences formalising rights in Africa, Asia and Latin America.

The main conclusions of this process are presented in this document, which shows that policies to formalise rights raise highly political issues and often contribute to exclusion. They can be powerful tools for greater

security, social integration and economic development, but only under certain conditions – in particular, recognising the plurality of norms and rights (especially collective rights), social validation prior to the registration of rights, reliable land management institutions, and a favourable economic environment – which often need to be created and are dependent upon other development sectors. It explains why there is no mechanical link between security of tenure and formalising land rights, or between formalising rights and economic development; why there is no universal model, and why land policies can only be chosen by the State and citizens concerned on the basis of clear development choices. Drawing on experiences in diverse contexts, this paper provides land actors with pointers for formulating inclusive and sustainable land policies (formalising land transactions, taking account of collective land uses and rights, putting in place local mechanisms and simplified procedures, facilitating policy debates, etc.).

This document only marks a stage in the process. The next step is to identify specific responses for particular settings (post-conflict situations, urban and peri-urban areas, etc.) and the possible content of alternative and complementary approaches to formalising rights in the strict sense (land taxes, securing collective rights and common goods, etc.).

The 'Land Tenure and Development' Technical Committee is an informal think tank composed of experts and officials from the French Cooperation. It was set up in 1996 to provide strategic support to the French Cooperation and supervise land tenure initiatives through a network of French and international actors. The Committee's outputs include the French Cooperation White Paper on land policies (2009), an analysis of large-scale land appropriations (2010), an ex-ante analysis of large-scale agricultural investment projects (2014), and numerous other works and tools aimed at improving our understanding of land issues in developing countries and our ability to meet the challenges they present. Full versions of all these publications can be found on the Land Tenure and Development website (www.foncier-developpement.fr), which was set up to provide access to good quality information on the sector.

