

BRIEFING NOTES

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

“Land Tenure and Development” Technical Committee

Rights to land and natural resources

by Michel Merlet¹, December 2010

When we look at access to land and security of tenure, we talk about formal ‘ownership titles’, ‘informal written contracts’ and oral agreements between various parties. The rights and rights holders concerned are not usually specified—something that often leads to misunderstandings and even conflict.

This paper aims to help fill this gap by proposing a clear, simple method for characterising rights to land and natural resources and holders of land rights that can easily be applied in different cultures and legal systems all over the world.

In order to improve existing land systems, we need to identify their advantages, limitations and contradictions. However, we only see what we know how to identify, and little is known about the nature of land rights as this has not been analysed in sufficient detail.

Knowing which rights need to be better defined and protected, and determining the necessary conditions for sustainable natural resource management requires an understanding of the nature of the rights associated with these resources. Legal systems and laws vary from place to place, and are often based on implicit, rather than clearly stated principles. The texts that deal with land employ common terms such as ‘property’ ‘estate’ or ‘domain’, but their meaning varies according to the person and context concerned, and this can distort our view of the reality on the ground. It is not easy to translate the words used to describe land rights into different languages and fully capture their respective meanings. This often leads to misunderstandings, sometimes with very serious consequences.

The elements that make land rights legitimate vary from culture to culture. This paper does not directly address this issue, but it is worth noting that in addition to their religious and ideological aspects, and excluding ‘rights’ imposed by force, social recognition of

rights is nearly always based on the labour invested in the land concerned.

The ‘rights’ under consideration here extend beyond those rights officially recognised by the law. Our starting point is the different levels at which these rights are recognised, in international, national, customary and local spaces that coexist but have no hierarchical links between them. This approach is known as ‘legal pluralism’.

Another paper in this series provides some examples of the diversity of rights holders and rights to land in West Africa.

The elements that make up rights

Rights to land and resources are made up of combinations of different kinds of elements. In this paper they are referred to as *components*. We will identify three families of *component*, which are linked with the different natural elements on which social practices are built: **resources**, **space** and **time**.

Analysing rights in this way helps us better understand how rights are distributed between rights holders, and determine how different land regimes develop according to the culture and history of different localities.

Production coordinated by:



¹ Michel Merlet, Director of AGTER: michel.merlet@agter.org

● The possibility of making use of resources

The opportunity to use the various resources that the Earth provides: those found above and below ground, mineral and energy resources, surface and underground water resources, flora, fauna (wild and domestic animals as a whole and their gene pools), etc., are all part of the first family of *components of rights*.

In certain societies the right to harvest fruit or pasture herds may be important and clearly differentiated from the right to use land for agricultural purposes. There is thus no single 'use right', but multiple possible combinations. The exact content of each right and what may and may not be done (such as restricting cultivation rights to non-perennial crops or banning tree planting) is defined by rules that are the expression of a second family of *components of rights*.

● The possibility of establishing rules for an area

This second family of *components of rights* relate to management or administration. Here it is not so much the actual resources that are concerned, as the space where these resources are found. The people or authorities that hold these faculties do not necessarily have the right to use the resources themselves. It is a matter of being able to define the rights of each person, and establish both rules and standards and the policies and mechanisms to facilitate their enforcement. In other words, to define concrete modalities that apply to everyone regarding access to land, the gathering of wild products, the productive use of land, the possibility of making money from resource use, investments in plantations or land developments

... and deciding whether or not to exclude other rights holders.

Because space is organised at different levels, partly as a result of natural cycles and ecological constraints, and partly because of social organisation, these rights are defined and exercised at different levels: putting in place national legislative frameworks and/or local norms, and establishing mechanisms for conflict resolution through the judiciary or negotiation and arbitration at the local level.

● The possibility of transforming rights over time and circulating them between diverse rights holders

Rights holders may or may not have the **right to assign some of their rights to a third party**.

Such transfers may be permanent or temporary and can take different forms, some involving financial transactions, others not: assigning the right to use certain resources for a specified period (rental, sharecropping, as security, loan), open-ended transfers (sale-purchase, gift, trans-generational inheritance, allocation or withdrawal by a superior authority, etc.). The 'alienation' of a good is just one of many possibilities.

Rights to land and resources can have **different time frames**: they may be permanent, open-ended (as with certain loans) or pre-determined in relation to seasonal, family, political or religious cycles.

The social and ecological contexts in which rights are defined also evolve over time. Most human societies have put in place explicit or implicit mechanisms to extinguish rights under certain conditions. For example, in agricultural societies on various continents it is



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common practice to return land that has been left fallow to the 'community' after a certain period. And under certain conditions the civil law system recognises rights acquired through the extinction of previous rights (adverse possession, known as 'acquisitive prescription' in French). These mechanisms allow rights that are seen as permanent to evolve by adapting to social, economic, ecological or technological change, and thus avoid conflicts caused by never-ending claims.

Different types of rights holder

Rights holders come in various forms, ranging from individuals to huge collective entities with or without legal status: from the whole human race (whose members can, or should be able to have certain rights); nation states and/or groups of countries; a social group defined by one or more specific criteria that may or may not be related to ethnicity; a nuclear or linear family structure; an enterprise, company, cooperative or 'trust'; and so on.

Therefore, certain rights relate to individuals and others to collective entities.



But individuals never exist in isolation: they also belong to a family, a lineage, a social group, are citizens of a state and members of the human race. This means that they have different rights and responsibilities depending on the different entities to which they belong, and that rights holders constitute bodies that interlock or overlap to varying degrees.

Rights may be distributed among them in many ways, and transferred separately during land transactions. The composition of the *bundle of rights* depends on each type of rights holder, varies greatly and is constantly evolving. One person's rights often imply obligations for others.

Constant co-existence between different rights and rights holders

For every parcel there are different rights and rights holders. Some may be individuals from the same family—such as women from one lineage group who have the right to collect certain fruits, while another member of the group has the right to cultivate the land. There may also be dif-

ferent types of rights holders involved: thus, one person may hold agricultural land use rights while the rural community determines which crops and rotations are allowed on village lands. If the rights are different there is no overlap (likely to cause conflict), but co-existence and interaction.

A single rights holder may also have different rights, as is often the case.

- The bundle of rights held by an individual rights holder is **the sum** of a certain number of rights. The legal system in place in Britain and its former colonies is based on this arrangement.
- Systems based on the *civil code* start from a very different premise, affirming that all rights are concentrated in the hands of a single rights holder, the 'owner', but are limited by law and regulations or other private rights. This is also a way of indirectly recognising the rights of other rights holders **by abstraction**.

The multiplicity of rights to a single parcel is not linked to low levels of development. It is the rule in all developed countries, and is more marked in urban areas than in rural ones.

Rights are constantly being established and reconstituted

Rights to land and natural resources are never established once and for all, but are constantly changing. They may have been assigned by States or colonial powers, or may have emerged over time with the consolidation of locally recognised rights through mechanisms of retrospective recognition or formalisation.

Recognising the co-existence of several legal systems, statutory or customary, is a first step. But there may be certain periods when neither system takes account of actual uses and practices on the ground, and neither meets the population's needs. This is why analysis of the nature of rights to use, manage and transfer resources should be based on fieldwork, independently of the way that these rights are regarded or ignored by existing normative systems.

People need to be able to build legal systems at different levels, from the very lowest (community) to the very highest (planet), and in ways that take the interests of future generations into consideration. We have seen that rights holders exist at different levels, since individuals not only have their own rights, but also have rights as members of a community, a country and so on.

Land is a natural element that is intimately linked with human institutions. This observation and the preceding points have important consequences for the way that rights to land and resources are dealt with, prompting us to examine systems of 'governance' by looking at how these rights are defined, applied and modified, and asking how they serve the interests of individuals and the broader community.

Unlike ‘government’, the term ‘governance’ refers to both formal and informal mechanisms: not only those exercised by the State, but also those put in place by local communities. Their combination at different levels, times and places reflects the relative autonomy of the actors concerned (subsidiarity) and shapes the production of communal rules and the mechanisms for their enforcement.

A system of governance is neither good nor bad in itself. Rather, it can be more or less effective in managing issues that affect a group of people, and ensuring that common objectives are defined in everyone’s interests.

Rethinking the distribution of rights between individual and collective actors

Every society has its own vision of space, conception of time, and perception of the place of the individuals within it. These aspects often need to be expressed explicitly in order to facilitate communication with outsiders.

The different categories of *components of rights* and different types of rights holders allow us to analyse and evaluate existing normative systems so that we

can improve land governance. By considering all the resources on a piece of land, we can describe in detail the composition of the bundle of rights held by each actor in every situation, whatever the social system, type of culture and specific history of the society concerned.

The method described here allows us to take account of the different possible combinations of rights and rights holders and better understand land rights in all their diversity. It can help us think about how both formal and customary rights can be adapted so that they can better respond to the major issues of the day.

Whichever continent or country we work in, there will be many cases where there is a need to review the composition of bundles of rights, and consider how they are distributed between individuals and different types of public, collective or community authority. The same applies to mechanisms that will allow rights to be adapted to increasingly rapid technological developments and socio-economic change.

This kind of approach could contribute to greater recognition of each individual’s rights and more secure rights for all. ●

FOR FURTHER INFORMATION

>> See the section on the AGTER website “Propriété ou droits multiples” www.agter.asso.fr/rubrique75_fr.html

>> LE ROY E., “L’apport des chercheurs du LAJP à la gestion patrimoniale”, Text published in: *Bulletin de liaison du LAJP*, n° 23, July 1998, pp. 29-57. www.agter.asso.fr/IMG/pdf/Le_Roy_1996_L_apport_des_chercheurs_du_LAJP_a_la_gestion_patrimoniale.pdf

Other teaching notes directly related to this topic

>> MERLET M., YOBOUET A., *Examples of the diversity of rights holders and rights to land and natural resources in West Africa.*

>> COMBY J., *Overlapping land rights Europe.*

ORIGINAL VERSION IN FRENCH “Les droits sur la terre et sur les ressources naturelles”, translated by Lou Leask.

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