Harmonising Formal Law and Customary Land Rights in French-Speaking West Africa[1]

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INTRODUCTION

The complexity of land tenure in West Africa is the result of the coexistence of several systems (whether customary - sometimes with Islamic influence - or state), none of which is completely dominant. Modern tenure legislation, designed in accordance with the model of private ownership and registration, takes no account of the legal principles underlying local land-holding systems, so that, in the eyes of the state, most rural people's landholding status is precarious, if not actually illegal. This legal pluralism, deriving from the colonial era causes a degree of uncertainty about land rights and leads to conflicts for which the many different arbitration bodies (customary, administrative and judicial) are unable to find lasting solutions. The gross inadequacy of colonial tenure legislation, which was largely retained after independence, resulted in legal reforms being adopted by African states during the 1980s. The reforms aimed to incorporate local land rights into the national legal framework, although the approaches differed widely. This chapter summarises current thinking on rural tenure issues in West Africa, then describes and analyses recent experiences before drawing some conclusions about ways to harmonise customary rights and formal law.

STATE LAW AND LOCAL LAND-USE SYSTEMS: LEGAL PLURALISM AND "MANAGING CONFUSION" IN WEST AFRICA

Socially-determined land-use rules

Any attempt at an overview of local systems shows the wide variety of situations on the ground and the profound transformation that they have undergone. Nevertheless, where customary tenure principles and local regulatory mechanisms still prevail it is possible to point out some common features. These include the fact that rules governing access to land and resources are an integral part of the social structure, that tenure is inseparable from social relationships; and that the use of land confers certain rights. These principles are implemented and arbitrated by customary authorities, whose legitimacy usually derives from prior occupancy (they are the descendants of the community founders) and the magic/religious alliance with the local spirits, or from conquest (Chauveau, 1998). These authorities (the land chiefs) then control the territory, exercising their political power to allocate land to other lineage groups and carrying out the rites required for them to clear it for cultivation (Bouju, 1998). Families settled in this way have control over the bush areas allocated to them, and these can become family landholdings with transmissible cultivation rights. Individual farmers may themselves delegate cultivation rights to "outsiders", in the form of short-term loans or, quite often, loans of unlimited duration with restrictions on the

permanent investments allowed. There may even be various types of rental or share-cropping arrangements allowed (Le Roy, 1998b). Such "outsiders" may marry into the community and become full members of it, thereby changing their status, and rights to claim access to land.

The distribution of rights is, therefore, based on the socio-political system (the political history of the village and region from which the alliances and hierarchical relationships between lineages are derived) and on family relationships (access to land and resources depending on one's social status within the family), so that social networks govern access rights (Berry, 1993). Far from being the result of enforcing a series of precise rules, rights held by individuals are the fruit of negotiations in which the local land authorities act as arbiters; customary law is by nature "procedural" and not codified. It does not define each person's rights, but the procedures by which access to resources is obtained (Chauveau, 1998).

These basic principles continue to apply in most of rural Africa, even though the authorities, socio-economic conditions and the rights themselves have profoundly changed over time. Researchers prefer to talk about local landholding systems, conforming to what Mathieu calls "socially-determined land-use rules" (*logiques sociales du territoire*), rather than customary systems (*système coutumier*), since the latter term could suggest something "traditional" or "ancient" with roots in the past. As is demonstrated by many field studies, local landholding systems do not consist of the rigid rights so often described in earlier academic literature. They are flexible, and evolve in accordance with the logic of customary law whereby rights are negotiated with the authorities on the basis of a number of shared principles. For example, new land-use rules may develop for plantations, small inland valleys (*bas-fonds*), etc. in response to new ways of farming and alterations to social relationships (see box01 below). Tenure rules also evolve in the face of major changes in the conditions of production, or when the pressure on resources increases. There is no system that is "traditional" or customary in itself, but there are forms of land management based on customary principles.

Legal pluralism

The state and society

Colonial states, and the independent states which followed them, enacted legislation on land and renewable resources. The colonial state was motivated by the desire to assert its power and to transform farming into a sector geared to development, but its action was based on profound ignorance of the local systems, both in terms of tenure and production. Some of the mechanisms imposed (e.g. public registration, derived from the Torrens system developed in Australia to distribute land among the settlers) clearly fit into a logic of land appropriation in favour of colonial settlers, inevitably involving the dispossession of local landholders (Comby, 1998). In French-speaking regions, the urge for centralised authority led the colonial state to seek to break the power of the customary authorities and replace them with state management, particularly regarding forests, fisheries, etc. In English-speaking regions, the system of indirect rule left more room for customary authorities. These colonial "traditions" were based on a different conception of the relationship between the state and its citizens.

A lasting mark has been left on the legal and institutional culture and landholding systems of both anglophone and francophone regions by the English Common Law and the French

Code Civil respectively. These imported legal precepts and the different objectives of the colonising powers coloured the interpretation of existing rights within indigenous legal systems. This distorted interpretation was then built into local handholding systems.

> "*Strictly speaking, customary law was derived from the way administrators interpreted rights over land and people as described to them retrospectively by the chiefs at the beginning of the colonial occupation. It was filtered not just by the chiefs and leading figures who tended to over-estimate and often invent the fees due to them, the privileges they held and the land they controlled, but also by administrators seeking to express what they heard in terms familiar to Western law and bring it into line with the demands of the colonial system*" (Olivier de Sardan, 1984: 223).[3]

In the main, the post-Independence states retained the colonial legal system and sometimes reinforced its centralising tendencies with the stated aim of binding the nation into closer unity. In the French-speaking regions, land was often nationalised, which amounted to formal abolition of customary systems. Use rights, however, have normally been tolerated and sometimes recognised in so-called *terroirs* (village community land), as in Senegal**,** but the customary authorities have usually been denied any official responsibilities (except in conflict management, for instance in Niger – see chapter 11). Legislation in these countries remains generally based on legal principles and a conception of law which are profoundly alien to the customary principles and landholding practices of rural communities (Le Roy, 1987, Keita, 1998). This dichotomy creates a situation of legal pluralism in which different, incompatible rules overlap.[4]

- **The effects of legal pluralism**

Areas governed locally by socially-determined land-use rules (i.e. the vast majority of land) fall within the scope of national legislation, in theory, if not always in practice. Within the same village or the same farm, areas governed by different legal systems may coexist. This can happen, for example, when part of the village land is removed from customary authority for an irrigation scheme in which plots are allocated by the state based on the labour power available to the household. The result is individual appropriation of irrigated plots held within a broader system of customary tenure (Mathieu, 1991). Legal pluralism causes uncertainty over rights, not because land-use rules and rights are ambiguous as far as local stakeholders are concerned, but because they can be challenged - and cancelled - through resort to state law or state authorities.

Thus, rights which are legitimate according to local rules, are often not legally recognised. Rural people find themselves in a position of permanent illegality and insecurity, especially in forest areas, where the gap between formal law and local practice is greatest. This exposes people not only to the imposition of fines levied by the Forestry Service, for example, for bringing fallow land back into cultivation, but also the risk of having their land allocated to other people via the registration procedure. In all cases, this situation has favoured urban elites (or people close to the regime in power), who have been able to exploit the legal system to acquire land or other renewable resources (forests, fisheries, etc.) to the detriment of holders under customary rules.

Box 1. Legal Pluralism in Cameroun.

Since the introduction of the Land Ordinances in Cameroon, in 1974, only 2.3 per cent of rural lands have been titled. The principal beneficiaries of registration and the subsequent exploitation of forestry resources have been the educated local elite, civil servants, politicians and town dwellers.

The spirit of the present land tenure reforms in Cameroon has been to put all lands, except lands covered by certificates of title, under the control of the state by classifying them as national lands (Ngwasiri, 1984). Thus the strategy from 1974 onwards, has been to reduce the interest of traditional communities in land to greatly restricted 'use rights'. The registration procedure is cumbersome, expensive and time-consuming and communities have been barred from registering unoccupied forests. To mobilise village communities and provide them with an incentive to engage in resource management, they must be given firmer and more permanent rights. At present, the forestry law is violated on a daily basis in many areas, and local people act as if such laws are non-existent.

Part of the problem lies in the fact that the Forestry Law is drafted in such a way that many key tenets are open to a high degree of administrative interpretation. Most studies within Cameroun suggest that when bureaucrats enforce the Forestry Law, their over-riding consideration is to interpret this in such a way as to vest themselves with power and privilege, or at least establish their standing with their peers and local communities. As a result, the local population view state laws as accumulative, arbitrary, oppressive and alien to their customs, from which a confrontational situation has emerged.

Egbe, forthcmoning.

The fact that tenure legislation is rarely, if ever, applied does not prevent it from having an impact. Political slogans such as "the land belongs to those who can develop it" (*mise en valeur*) speed up the rate of clearance, both by migrants seeking to appropriate virgin or fallow land and also by customary landholders using evidence of tillage to protect their rights. Loans also become less common, for fear that borrowers will try to appropriate the loaned land. Stakeholders pick and choose opportunely between the different systems to further their own interests. The authorities responsible for enforcing the law (territorial administration, courts, etc.) and urban elites, for example, may have a strategic interest in using the law to claim rights to which local rules do not entitle them.

Box 2. Occupation of land to pre-empt Niger's Rural Code

Niger's Rural Code was introduced in 1993 to formulate clear and binding rules for land distribution and use which would give agricultural producers legal security, thereby according locally established customary laws the same legal status as modern laws. The aim has been to avoid changing the actual distribution of land while clarifying the conditions under which land is held. In particular, the Code has sought to encourage investment in land and according rights to those able to make good use of it (*la mise en valeur*). This has led to some land owners taking back land formerly loaned out to others, since they fear that the "tiller" of land will acquire firmer claims as a result of the new code. Since 'making good use of land' is interpreted to mean cultivation (rather than grazing), there is evidence of many farmers seeking to expand greatly the area which they can claim to be cultivating. This usually involves no more than a rapid clearing of former grazing lands, a quick chopping down of bush vegetation, and a brief acquaintance between the land and a plough.

The announcement of the Rural Code has constituted an invitation to have customary rights in land recognised now in order to secure irrevocable private property rights later. "Get customary rights in your land recognised before your neighbour does" seems to be the main message which people have retained from the Rural Code

Lund, 1998

Finally, far from doing away with the patron-client aspect of customary tenure systems, both colonial and independent governments strengthened it by reorganising socio-political networks governing access to land around the state machinery (Berry, 1993) [as discussed below].

- **Hybrid practices**

Evolutionist theories of land rights tend to cite causes such as demographic and market pressure for changing local practice and increasing tenure conflicts (see chapter 2 infra; Lavigne Delville and Karsenty, 1998). However, these changes and conflicts may themselves be the product of state-led policies in conjunction with legal pluralism. The uncertainty surrounding rights is directly responsible for some conflicts as people take advantage of the dichotomy between the rules. One can no longer contrast "traditional" local practices with official legislation; rural communities have been faced with state interference for almost a century and have incorporated external concepts in their landholding practices. Stakeholders are often opportunistic, and make use of various systems to back up their land claims. Current local landholding practices are not "traditional". As Le Roy stresses, they also borrow from state law, resulting in hybrid contemporary systems which do not follow a linear progression from "traditional" to "modern"[5].

Arbitration problems: the multiplicity of authorities

Recent studies show that legal pluralism need not be a problem in itself (Chauveau, 1997). The real problems arise not from the coexistence of different systems but from the multiplicity of arbitration authorities. There are unclear links between authorities such as customary chiefs, imams, *préfets* who do not stay long in one post, project technicians, interfering politicians and so on (Lund, 1995). This leads to considerable uncertainty over who may deliver rulings, such that no arbitration can ever be accepted as final, because a decision by one authority may be overruled by another. As a result, outcomes cannot be predicted and all forms of arbitration may be challenged, so conflicts escalate and lasting solutions are harder to achieve.

This problem is compounded by the complexity of interrelated legal texts, which are unfamiliar and poorly understood even by members of the local administration, and by the absence of clear political directives. In this situation, presenting the authorities with a *fait accompli* tends to stand a good chance of success (see Box 0.2).

Box 3 Straying fields and straying livestock in the Ferlo, Senegal

A twofold process is bringing about a major shift in land from grazing to cultivation in the Ferlo region of Senegal. The scale of degradation and poverty of the soils in the old groundnut-growing area are such that groundnut producers are urgently searching for more fertile lands. This means that the open areas set aside for grazing, including those which have been legally allocated as rangelands by rural communities (?? Is it sure ?? it seems to me that rangelands are seldom allocated by rural councils), are either taken over illegally by farmers, or simply reallocated by the rural councils.

However, such settlement is not undertaken in an anarchic, disordered manner. It is often a carefully thought out operation, and prepared by the group concerned, such as the powerful Mouride brotherhood.

Taking advantage of their demographic and economic and political weight (at both central and rural council level), this community presents the administrative authorities with a *fait accompli*.

The colonisation technique consists of setting up farming hamlets in grazing areas and then settling permanently by encouraging the establishment of a village around the original hamlet (Traoré and Ka, 1996). Having colonised the land in this way, the farmers gradually claim tenure rights, a dynamic process whereby they gradually restrict the area traditionally given over to livestock and reduce fodder resources and access to water points. While reference is usually made to straying livestock and the damage caused to fields, the phenomenon of "straying fields" and the damage they cause to pastoralists must also be taken very seriously. In addition, livestock chased out of the best grazing are always tempted to return, causing damage to fields, a direct consequence of rangelands having been ploughed up. Such crop damage results in increased disputes and the risk of heavy fines.

Once again, we see the consequences of legal marginalisation of pastoralism. Pastoral use is, wrongly, not considered "making good use of land" (or "*mise en valeur*"). Nor are Peuhl encampments considered to have a similar status as villages. Thus farmers can claim that the land they have colonised was not previously occupied and can ask the rural council to make their settlement official.

Juul, 1999; Traoré, forthcoming

Managing confusion?

It is the possibility of contradictory claims being out forward, rather than any uncertainty about customary rights as such, that is responsible for the unpredictable nature of disputes over land. The inadequacy of legislation has also been denounced repeatedly, but the various adjustments and reforms have had little real impact. It is no longer possible, more than 30 years after Independence, to blame the situation entirely on the colonial past, or on legal training that is biased towards the French Civil Code.

> "*Wherever access to resources is highly politicised and the rules are confused, it is generally those who have the most financial resources, or those who have privileged access to political power and strategic information (including simply the ability to understand and use the complexity of the laws) who draw the best advantage for themselves from the coexistence of different rules and the resulting regulatory confusion. Hence, this confusion and the non-application of land rules are not simply accidents or unfortunate imperfections, and their role is not a negative one for everyone*" (Mathieu, 1995: 56).

Thus, while it facilitates change and thus plays a relatively functional role in rapidly evolving contexts, the confusion surrounding land rights favours powerful players, particularly the political-administrative class and some local elites who are the only ones able to master the legal and administrative complexities. They take advantage of the situation in varying degrees: using their influence to acquire land, arranging allocation of land in irrigation schemes to civil servants, using the concession procedures to transfer state-owned land to political elites, and gaining various (political and economic) advantages from charging for arbitration. Forestry Commission staff throughout the region have been known to receive bribes from granting logging permits or imposing arbitrary fines on local people forced into permanent illegality.

Box 4 The Nigerian Land Use Decree: Evidence from English-speaking West Africa.[6]

The Nigerian Land Use Decree of 1978 vested all land in the hands of the government, 'in trust' for the people. It was based on the view, prevalent in the 1960s and 70s, that customary tenure systems were by their very nature backward and not conducive to the development of a dynamic agricultural sector,

and that, by contrast, the state was able to act impartially to identify opportunities for economic development and growth. The decree provides for the appointment of rural Land Allocation Advisory Committees by the governor of each state. All previous forms of title were replaced by 'rights of occupancy' that could be granted by local government, and revoked where such land was needed for public purposes.

The government used the Decree as the means to acquire major areas of land for a variety of purposes, including housing for government staff, building of universities, as well as for irrigation schemes and other development projects. Equally, significant areas of land were turned over, with minimal compensation, to large scale commercial producers, at the expense of smallholder farmers and herders. Far from creating a greater sense of security and reducing land speculation, the Decree has helped prompt a movement towards the acquisition of land through whatever means people can exploit, while distribution of land holdings has been a very important form of political patronage for those in power. Increased uncertainty also has been created around tenancy, since the government's claim to now own all land has led to some tenants refusing to pay rent to the person they consider their former landlord.

Francis, 1984; Knox, 1998; Kolawole, 1997

Finally, as access to land is related to social identity, the land rights of some social groups are frequently contested by challenging their national and ethnic identity, opening the door to the political exploitation of ethnic tensions. It is a volatile mixture; politicians play on competition for land and on social identity, which leads to challenges to national allegiances against a background of ethnic divisions. Such tensions have recently become very apparent in the case of Ivory Coast and Kivu (Eastern Zaïre/Democratic Congo; cf. Mathieu et al, 1997), as well as in Kenya (Médard, 1996).

There is, in fact, more logic than disorder in the current situation, which leads Mathieu to agree with Piermay (1986) when he refers to African land tenure systems as "managing confusion". A similar point has been made by Moorehead (1996) when he speaks of 'structural chaos' to describe processes for administering access to resources in the inner Niger Delta of Central Mali.

HARMONISING FORMAL LAW AND CUSTOMARY LAND RIGHTS: RECENT EXPERIENCES IN FRENCH-SPEAKING WEST AFRICA

We have seen that legal pluralism lies at the heart of the tenure issue. The logic of state ownership gives an ambiguous legal status to local landholding systems (rights and regulatory mechanisms), oscillating between denial and mere tolerance. Having recognised this, the challenge for new policies is to do away with the gross inadequacy of tenure legislation, to give legal recognition to existing rights, and to build links between local landholding systems and formal law. Using different approaches and strategies reflecting their political history, the French-speaking West African countries have, since the mid-1980s or early 1990s, engaged in comprehensive debate about the tenure issue, leading to legislative reform (ongoing or under preparation) and/or innovative interventions at local level, all aimed at harmonising the two systems. We shall give a brief overview of these before drawing some lessons.

The principles of the post Independence legislative reforms

Senegal anticipated these issues with its very innovative 1964 law on State-administered Property (*Domain National*) although it was only fully applied in 1980. While retaining the principle of national property owned by the state (all non-registered land), in rural areas the law distinguishes between "pioneer areas" which remain under state control and *terroir* areas where land management is the responsibility of the rural councils set up in 1972. The existence of local use rights is recognised in the latter areas, but the land may be taken over by the state for development projects or allocated by the rural councils to whoever can "develop/use it productively".[7] Such allocation mirrors the registration procedure, on a local scale and with fewer legal guarantees, as land may be allocated to individuals without taking existing rights into account. In practice, however, the rural councils rarely make allocations without the agreement of customary holders.

Another major reform was the Agrarian and Land Reform of 1984 in Burkina Faso. The revolutionary regime of Thomas Sankara hastened to enact a very complex legal code, bringing in a "modern" tenure system centred on ownership of cultivated land by those who worked it. In its "revolutionary" logic, the reform rejected any role for the customary authorities, which were regarded as representing "feudalism". The reform law, which denied all customary rights, was so complex that not even the local officials responsible for its enforcement could understand it. Two successive versions followed (1991 and 1996), which allowed for private property and recognised existing customary rights in undeveloped areas (although providing no legal safeguards to support such claims). In essence, the government tolerates customary claims, so long as they do not compromise the state's own development plans. At the same time, traditional chiefs have been brought back into the consultation process for re-formulating the RAF and have successfully delayed the subsequent legal revisions of the legislation (Ouedraogo and Toulmin 1999).

In Mauritania, the development objectives of a private irrigation scheme in the Senegal river valley led to a 1983 land law (amended in 1990) clearly favouring private ownership and based on the concession system which, for political reasons, remains very centralised and retains cumbersome colonial registration procedures (Crousse, 1991).

In the 1980s, pressure from structural adjustment programmes encouraged the privatisation of land in West Africa but, with the exception of specific contexts such as noted for Mauritania above, the political authorities resisted this. The state always retained ultimate rights to land, so there was never a question of issuing full private land ownership to citizens. However, privatisation, whose appropriateness for rural Africa is hotly disputed by most observers, was not the only response to emerge from the widespread questioning of state management of land. A better understanding of local landholding systems encouraged the clearer recognition of local rights. International debates, particularly those held under the auspices of CILSS and the Club du Sahel, put forward the idea of decentralised management of land, based on recognising the logic and efficacy of local land-use practices.

Le Roy (1998a) notes three main trends in the legislative reforms of the 1990s aimed at harmonising the different landholding systems:

- codification of local land rights and national laws;
- the registration of local rights with the aim of giving them legal status;
- subsidiarity within state administration of property and management of 'common heritage'.

Codification prolongs colonial attempts to classify customary rights and seeks to provide legal definition to land-use rules applied in practice. The aim, then, is to integrate the customary systems into formal law, with rules clearly spelled out. The recent Rural Code of Niger follows this trend, drawing on prolonged studies of local farming, pastoral and forestry practices. However, the desire to take local practices into account in this way comes up against the obstacle of their great diversity. Customary practices are not a series of precise rules applicable to everybody in a given area that just need to be formalised. They are the particular expression of general principles, in accordance with local socio-political history, the social status of individuals and negotiation with other stakeholders and the land authorities. Even within units which are homogeneous from agro-ecological and/or socio-cultural points of view, the identification and formalisation of customary practices can only result in the simplification of a complex body of otherwise flexible and variable rules.[8]

This failure to reflect the diversity of local practices means that the Rural Code in Niger is in danger of being perceived as inappropriate or illegitimate in a locality, though much less so than the legislation it is slowly replacing. Codification still follows a positivist approach, which assumes that the purpose of law is to define how things should be, and aim to transform reality accordingly. The Rural Code also makes provision for the setting up of "Land Commissions" at district level (currently being done on an experimental basis), with the task of receiving applications for land title, recording land rights, and issuing title deeds. Existing rights may be formalised through simplified procedures, on request. Yet as the concept of "ownership", cited in the basic statutes of the Code is not defined, conflicts are likely to ensue over who may be recognised as an "owner" (Lund, 1993, Gado, 1996). A key part of the approach embodied in the Rural Code is to carry out detailed surveys and to hold public debates. However the difficulties in organising these, coupled with fear of the potential risks of the reform, sometimes gives the impression that the whole process has become bogged down in detail and consultation.

In view of the difficulties and political implications of legal reform, Ivory Coast has also adopted since 1990 an instrumental approach, the Rural Land Plan (*Plan Foncier Rural*), which attempts to identify and map all existing land rights. A flexible and effective survey and mapping method has been devised, with the intention of producing a simplified land register (cadastre). The aim was to record the existing rights and arrive at a local consensus; the subsequent land reform would define all the recognised forms of tenure and give legal status to the local rights recorded. The approach is intended to be a politically neutral one, since it seeks merely to give concrete expression to actual existing rights. In fact, the instrumental logic of the Plan creates difficulties of a different order. During the current pilot phase, the emphasis was placed on mapping. Consequently, the socio-tenurial analysis of existing rights has not been deep enough (Chauveau et al., 1998). Despite the declared intention not to fall into the trap of "ownership-based" simplification, the different levels of interlocking rights that actually exist have been reduced in the surveys to a simple differentiation between "land managers" and "land users". Secondary rights, for example those of women and rights to grazing land are superseded in the records in favour of the right to cultivate. Finally, in the interval between the start of the pilot project (1990) and the adoption of the law (1998), uncertainty has remained over the legal categories to be established (for example, where would collective rights fit in? and, therefore, over the future of existing rights.[9] La récente loi foncière (déc.98) tourne le dos à cette approche en promouvant une propriété privée, et obligeant à une immatriculation individuelle rapide des terres enregistrées.

In Mali, the transitional government set up after the overthrow of Moussa Traoré's dictatorship suspended the Forest Laws (one of the causes of an earlier peasant uprising) and launched a debate on the links between tenure issues and decentralisation (Diallo, 1996). The aim was a substantial revision of the 1986 *Code Domanial et Foncier*, and a specification of the powers of the future municipal authorities. Following the *Conférence Nationale et aux Etats généraux du Monde Rural*, an innovative plan for a land charter was launched. The Land Observatory (*Observatoire du foncier*) was set up in Mali to encourage debate on tenure issues and to provide support to those development projects which were involved. Its brief was to study land-use practices and their dynamics in the various agro-ecological regions and to put forward proposals in respect of the charter. The approach was both ambitious (rejecting a land and property code in favour of a land charter recognising rights and local tenure rules) and cautious (launching a series of field analyses). This approach fitted in well with the reforming ambitions of the transitional government, but now, this radical approach has been set aside in favour of a more straightforward revision of the existing legislation. One problem is that the municipal authorities are being set up without adequate prior clarification of the tenure issue. Although a "communal estate" is established within which the rural commune has jurisdiction, the issue of how village and communal decision-making structures are linked together has not been resolved.

Initiatives focusing on managing the common heritage (*gestion patrimoniale)* (Le Roy et al., 1996; Weber, 1998) have recently begun to be implemented in Madagascar, but not in West Africa. However, some experiments with regard to timber resources have applied similar principles in Niger (see Bertrand, 1998).

Box 5: Rural firewood markets in Niger.

Legislative reforms in Niger brought in during 1993 have allowed for the formal transfer of powers from central government to local people, as it concerns the management and use of woodland resources. These have established rural firewood markets, which consist of a site where firewood can be sold by a local body which has been recognised by both customary and state structures. This permit to sell firewood is linked to the existence of a plan for the conservation and sustainable management of the woodlands from which the wood has been cut. Firewood sold through these markets is taxed at a lesser rate than that stemming from unregulated sites.

There are now more than one hundred such firewood markets in Niger, each one associated with an area of woodland where increased control over offtake is being exercised, with the benefits being reaped by local people. It is reckoned that they now provide at least 10% of the fuelwood needs of Niger's towns. They have been an excellent means of bringing together a number of actors who, in the past, have not found it easy to work together – such as forestry agents, traders in charcoal and firewood, and local people.

These firewood markets demonstrate clearly the need to combine the interests and functions of many different actors. For example, despite their emphasis on local management and incentives, the establishment of this system would not have been possible without government support and action; by setting a differential rate of tax, by changing the legislation to provide formal legal backing to their operations, and setting up a more effective, transparent way of monitoring supplies and transport of firewood.

Bertrand, 1998.

Box 6: The commonwealth or common heritage of the nation

The principle of *gestion patrimoniale* rests on the concept of common heritage. This has been put forward as a new legal concept to move away from the idea of state ownership of natural resources which is seen as too closely connected to state management. To say that land is the patrimony or heritage of all citizens with respect to existing rights is to give them the legitimate right to manage these resources. In effect, this concept does not challenge ownership, but is aimed at taking into account the actual use of land and resources by different groups, and exploring joint management through negotiation. Furthermore, it explicitly introduces the well-being of future generations as a concern for whoever manages the patrimony whether it be the state, a community or an individual

(**Karsenty in Lavigne Delville, 1998a).**

Major issues

Most surveys and expert studies advocate decentralised management of land and resources, restoring decision-making powers to local communities and seeking alternative methods of settling conflicts. Legislative reforms, however, range from privatisation through registration to recognition of local rights. There are also different degrees of recognition: from mere tolerance, as in Burkina Faso, where local rights are limited, to the attempt by Ivory Coast's Rural Land Plan to map all existing rights in order to give them legal status. In between, lies Niger's recognition of existing farming rights and the possibility of registering these on request.

Although we have little benefit of hindsight so far, comparison of the approaches and analysis of their initial results allow some of the major issues in these processes to be identified.

The question of interlocking rights

Under customary systems, apart from the territorial control exercised by the land chiefs, cultivation rights are exercised at different interlocking levels. All bush land cleared by a lineage makes up its landholding, under the overall responsibility of the head of the lineage. However, depending on inheritance rules and the degree of operational autonomy enjoyed by individuals, the actual division of land and cultivation rights may be managed at the level of the compounds (residential units) or directly by the production units, with the higher levels of the kinship structure playing only a minor or formal role. Even when land is managed at farm level, the compound head may sometimes arrange reallocation to offset demographic imbalances between units. A distinction can thus be drawn (Schlager and Ostrom, 1992; Le Roy, 1996a) between management of administration rights and management of use rights, which may both of them occur at different levels of the lineage social structure[10].

Another dimension to this interlocking system is the existence of derived rights (*droits délégués).* Also known as secondary rights, these may be temporarily delegated by a holder of cultivation rights to an individual. The head of a farm may allocate plots to his dependants (young people and/or women), in accordance with social rules and land availability; various types of agreements exist to allow an "outsider" or someone who is not a member of the family to cultivate a plot - short or long term leases, sharecropping, pledging, etc. (Le Roy, 1998b).

Finally, when the same piece of land supports different resources (eg. crops, pasture and timber), each resource is usually covered by specific rules of appropriation and use. For example, a field cultivated individually during the growing season becomes common grazing land after the harvest and until it is needed for the following growing season. Also, the use and ownership of trees may be separate from the use and ownership of the land on which they grow. However, this obviously may change as cropping patterns shift. Examples include the exclusion of transhumant cattle from areas taking up cotton

cultivation, since the cotton harvest comes much later than those of cereals, and farmers want to avoid risks of crop damage. Equally, example of farmers becoming more dependent on mineral fertiliser so that relations of exchange with transhumant herders has less and less benefit to them.

This level of complexity (varying from place to place) clearly illustrates why a perspective based on ownership, which considers that all administration and management rights are in the hands of a single person, and distinguishes only between owner and user, cannot reflect the reality of local systems and may invite or exacerbate many contradictory claims to the same area. At each level, stakeholders can claim to be the "owner" or main holder of all the different rights. The use of the term "owner" triggers a struggle between claimants (holders of rights) to gain recognition as such. The head of a lineage may seek to become the owner of the land he is managing on behalf of the family group, thus reducing the other members of the family to the status of mere tenants or sharecroppers. On the other hand, attempts by farmers or household heads to be recognised as owners, would be tantamount to breaking off ties with the lineage. The secondary rights of women or young people are also liable to be marginalised in this process. As regards derived rights, conflicts hinge on payment or non-payment of the symbolic fee, marking the holders' acceptance of the higher authority. In many cases, willingness to pay such symbolic fees falls off after some years, with migrants considering themselves absolved of further claims, as can be seen from Mossi farmers moving into south west Burkina Faso (Hagberg 1998). Encouraging the recognition of exclusive ownership rights may be a political choice, but it is important to realise to what extent social relationships and land-use are thereby transformed, and to weigh up the social and economic issues and risk of conflicts.

Any operation to register land rights comes up against the difficult question of status. One could devise categories to reflect grass-roots realities, specifying the lineage holding to which each plot belongs, who has the right to allocate the farming rights, who holds the farming rights and on what terms, the different encumbrances on the plot (common grazing, rights to the trees on the plot), specific arrangements applying to the plot, etc. This would, however, produce a most unwieldy system, which would in any event lose the flexibility provided by customary rules.

- **The question of the authority system**

> "*Every ownership system is based on a system of authority. Only an efficient authority can guarantee the effective and lasting application of the relational fabric of rights and reciprocal obligations on which the ownership system is based*" (Mathieu, 1996: 41).

In the debates on land in West Africa, "*an unspoken, fundamental question is that of the relationship between the power of the state and that of the customary authorities*" (Mathieu, 1996: 41). In formal law, the recognition of 'customary rights' is most often limited solely to the right to cultivate. This is the case in Ivory Coast, Burkina Faso and, more ambiguously, in Niger, where the "traditional chiefs" were granted a right of arbitration. This restriction disregards a fundamental element of customary regimes: the role of local authorities, such as the political chiefs and land chiefs, appointed by the State. These local authorities have the task of implementing and regulating rights, and provide an essential component of local land-use systems. Even though the state has sought to take over the

monopoly of land authority, these local authorities usually remain legitimate in the eyes of the community or continue to enjoy considerable political power.[11]

This is, therefore, a debate about local land management bodies, their status (state, local or equal representation), their composition and their prerogatives. As centralised state management has proved inadequate, consensus currently favours "local" management. However, the apparent consensus around the loose term "local" hides a split between those who advocate continued control by the state's technical services, in consultation with local people, as compared with supporters of decentralised management that provides real powers to the community (Bertrand, 1996). These questions about levels of authority and types of management body encompass important political debates about the relationship between the state and local communities and between the state, the customary authorities, and the new local elites. When harmonising legal systems, should room be made for the customary authorities? If so, which authorities, and how might this best be done?

It is easy to overlook the fact that local land authorities are also involved in the competition for resources. Lineage chiefs sometimes sell parts of the lineage holdings over which they hold only management rights. As competition for land and resources grows fiercer, however, motives for excluding outsiders can override those for their inclusion[12].

Where the population is heterogeneous and where the number of "outsiders" is significant, the choice and composition of local authorities raises several political and economic issues. Endorsing "customary" power could sustain exclusion, strengthening the "ownership" rights of the indigenous population at the cost of undermining or even withdrawing rights granted to migrants, in some cases decades ago. Conversely, installing "democratic" or elected bodies could give power to migrants and trigger strong reactions on the part of the indigenous population. Each of these institutional options are linked to political choices.[13]

One of the difficulties in harmonising customary rights with formal law is that they are both of a very political nature, but are based on radically different principles of authority. Customary as well as state authorities claim rights to control and allocate land. What room can then be found for common ground?

The power to allocate land

The right of eminent domain and the power to allocate land rights are fundamental to customary systems and the power of the local land authorities. In establishing state control over land and concession procedures, both the colonial and post-Independence governments also gave themselves powers to allocate, which in Senegal were then delegated to elected rural councils. While land chiefs' power to allocate land was generally confined to uncleared bush and was thus extinguished when the entire territory had been allocated to lineages, states assumed the right to allocate already occupied land. It is clear that the power to allocate land is a structural feature of landholding systems and is why they are inherently based on patronage and political power at both national and local level.[14]

Harmonising two legal systems: by registration or authority systems?

Private ownership cannot be imposed from the top down. Attempts to transform practices radically through law have proved ineffective. Landholding systems have their own dynamics that are subject to economic developments and power relations. The state may influence them and provide them with guidelines but, save in exceptional situations, it

cannot swim against the tide. It is also acknowledged that local landholding systems are not the expression of an unchanging "traditional law", but the fruit of a process of social change, which incorporates the effects of national legislation. The relationship between ownership, land title and productivity has recently been reassessed, demonstrating that customary systems rarely hinder agricultural intensification (Bruce and Migot-Adholla, 1994; Platteau, 1996). Consequently, the issue is no longer one of substituting a "modern" tenure system[15] for a "traditional, ineffective" system, but of getting away from the unregulated coexistence of tenure rules. In this way, the logic of state ownership of land and resources and the allocation of concessions "from the top down" from which it originated, should be replaced by granting legal recognition to local landholding systems. Even if the aim is eventually to promote private ownership, this will not come about through the spread of registration procedures, but rather through gradual evolution of existing rights, facilitated by the law. The paradigm is thus one of "adaptation", rather than "substitution" (Bruce et al., 1994).

As discussed above, to recognise the existence and legitimacy of rights is not the same as going back to the frequently idealised "traditional" systems. The local context in Africa has changed; landholding practices and rights to land have progressed. The existing reality, with all its complexity and hybrid forms, must be taken as the starting point. This does not mean taking a neo-traditionalist stance, and advocating "customary" rules which are no longer enforced, or simply allowing customary authorities complete control[1].

How, therefore, can legal systems be harmonised? Recent initiatives in Africa are based on recognising the current duality of the land authority system, namely the legitimacy of both local practices and state intervention. By approaching such harmonisation from the status of both use rights and the system of authority, the two systems are combined in varying proportions.

- **Registration**

Those in favour of registration propose the harmonisation of the two legal systems through legal recognition and registration of ownership rights and other existing rights in order to bring them under formal law. It is still up to the state to put land rights on a secure footing but, by adopting a lighter approach, it is possible to break away from "immatriculation" as only way for official land titling. This requires the mapping of plots, the creation of a land tenure register and a system for recording changes in rights over time. As this comes close to the cadastral approach, promoting private ownership of land is often an implicit or explicit goal of such policies. Nevertheless, although technically more complex to implement, the lighter approach could acknowledge other sorts of land appropriation, and this does not amount to adopting a simple system of individual private ownership. There are various procedures possible, such as creating new, innovative legal categories matching local socio-tenurial categories; issuing titles in collective names; recognising various forms of derived rights; and acknowledging any restrictions on the right to alienate land or "encumbrances" connected with other use rights over the same area. All of these provide a better "fit" with existing rights. Deciding which types of rights should be acknowledged is therefore more a political or legal choice than a technical question (even if the practical

[1] Experience in English speaking countries has shown problems associated with this; that chiefs sell land over which customary system allows them only a right of administration, thus dispossessing farmers of their land (Abudulai, forthcoming).

complexity of implementation should not be underestimated). However, this type of arrangement does call for complex tenure information systems and an administration responsible for managing and updating them, which raises the problem of its cost for both the public authorities and for holders of rights (transfer fees, etc.).

Moreover, in this model, security of tenure is based on land title and the state, superimposed on local mechanisms and the steps taken by stakeholders to secure their rights in a world governed by many different rules (Koné et al., 1999). Land tenure management becomes an administrative act, linked to recording transfers, rather than a socio-political mechanism in which the customary authorities act as arbiters. These authorities are left with practically no role to play (except perhaps as mediators in cases of conflict during a transitional phase before the registration system has become fully operational). Registration implies quite a radical transformation of the *ways of managing* land rights and hence the very nature of local landholding systems (with implications for the whole social structure of local society).

Where land value is so low or tenure so secure that rural communities do not see the need to register land transfers, or where procedures are complex and costly, or where accepting formal arrangements means breaking with long-standing principles of local land-use management, it is highly unlikely that information will be updated. In these cases, the tenure information system rapidly becomes obsolete and is overtaken by informal ways of achieving security. This leads towards confusion surrounding rights rather than clarifying the rules of the game.

- **Managing the common heritage**

This concept takes regulation as the starting point and aims to provide security of tenure by clarifying rules and forms of arbitration, so as to reduce ambiguity about which norms are legitimate. The aim is not to formalise all rights as such (except when customary rules are no longer sufficient to ensure security of tenure), but for stakeholders to adopt a system of shared rules so that, at least at local level, the rules of the game are the same for everyone. The approach is based on a concept of the land and its resources as forming part of the common heritage. Le Roy (1996b: 311) explains that "heritage is, by definition, non transferable (which is what distinguishes it fundamentally from property) and it is inter-generational by nature (it must be handed on undamaged to subsequent generations). It has a permanent character and is intimately related to its holders' identity of which it is an essential component". The concept of heritage management also recognises local arbitration mechanisms, operating in accordance with principles laid down at national level. Rules could change partly through negotiation and partly through jurisprudence. In this way, there is substantial reliance on mediation and judicial process, but the important role of the customary authorities is recognised. Rather than suppressing legal pluralism by absorbing one system into the other, the aim is to retain the most dynamic aspects of each. At the same time they are linked together within a national legal framework and a hierarchy of arbitration bodies, in order to avoid the most flagrantly perverse effects of the current situation. This means improvements to arbitration processes, whereby the local authorities are approached in the first instance and/or joint authorities are set up at regional level. Their role is to define national land tenure principles in accordance with specific regional features, or to settle conflicts by coming up with solutions which are acceptable according to both systems. Forums may be organised to help reach consensus over the principles to be used in a given area, and these may also be used as a vehicle to enforce these principles (Le Roy et al., 1996).

Attempts are often made to find a middle road or a hybrid form for land tenure administration, borrowing from both systems to varying degrees. Different elements can be found in recent litterature, including :

- subsidiarity, which gives genuine prerogatives to the community, without challenging the principle of state administration ;
- allowing land titles to be issued on demand, with the state providing additional security on top of local mechanisms for safeguarding tenure;
- legal innovations that move away from excessive reliance on the French Civil Code, for example registering land in collective names[16], and registering village lands to protect them against expropriation;
- considerable delegation of land tenure management power to bodies arising out of administrative decentralisation;
- provisions aimed at directing change towards greater individualisation and greater circulation of land rights, for example, allowing registration on request.

In any event, emphasising rights (via registration) or rules (and arbitration) is more a matter of making political choices about systems of authority and regulatory mechanisms than a technical issue. Discussing about the system of authority allows to debate the institutional coherence of land tenure management framework. Is it realistic to think that village committees can provide an open, neutral forum for the regular updating of a tenure information system whose very rationale profoundly alters the nature of local landholding systems?

Box 7:Local conventions: Institutional innovation for managing collective resources.

A local management convention is a contract between villagers and the administration to regulate the use of land and other natural resources. It is signed by village representatives and the administration and both parties are responsible for it being carried out. Since 1993, several programmes in Southern Mali have assisted villages with the development of local conventions in anticipation of the new forestry law.

In the case of the Siwaa programme, lengthy and sometimes difficult negotiation resulted in a local convention between six villages, the local authorities and the government technical services on a mutual understanding of each other's role in the sustainable exploitation of the forested areas. The initial formulation of the convention took two years. This was partly because one village was afraid that the convention would mean loss of control over their land given that it was the only village which held a land surplus. Only through direct dialogue with village leaders, explaining that no long term effect on land rights was intended, could agreement be reached.

Conventions are likely to touch on sensitivities concerning customary property rights. Understanding the nature of disputes and conflicts over resource use and land rights, was very important to the formulation process. The Siwaa experience showed that feedback mechanisms, information exchange and communication need special attention. The forestry services accepted most regulations proposed by the villages after some discussion. Initially, they did not want to give villagers the possibility to impose more stringent restrictions than those in the forest legislation. The villagers' list of trees to be protected, for example, was more detailed than that of the Forestry Service and they also insisted on the obligation of all households to use improved wood stoves. However, the Forestry Service was not able to allow higher levels of fines, nor to permit the village to receive a significant share of the proceeds, as these were strictly governed by the forestry legislation. The resulting convention makes reference to respect for both customary rules and forestry legislation, providing a clarification of how and when, the rules should apply.

Involving villages and the local administration in this form of co-management is a major breakthrough, given the rather conflictual relations of past decades. It is clear however that it requires a serious commitment on the part of the government departments and the local administration to ensure its rules are respected.

Source: Hilhorst and Coulibaly, 1998

In all cases, clarifying tenure necessarily involves clarifying multiple claims to land. Claims based on "prior occupancy" or "indigenous occupancy" are particularly problematic. While they are an issue for legitimisation, they are often the basis used to justify the revival of "ancestral" rights that may have been lost, or to challenge open-ended loans of land that were later transformed into de facto ownership. In some cases, the intervention of the Rural Land Plan in Ivory Coast enabled the Senoufo to re-claim ownership of land that had been made available to a Dioula village several generations ago (Chauveau, pers. comm). To avoid such injustices, there needs to be a statute of limitations [est-ce bien ça le terme ?], granting ownership or appropriation rights to those who have actually exercised them over a certain period of perhaps 20 years, or even a generation[17].

CONCLUSION

Once land title is no longer seen as absolutely vital to the process of agricultural intensification in Africa, the question of tenure shifts from the economic to the social arena. Although an *economic* impact may be achieved by putting transactions on a secure basis and allowing freer movement of land rights, the challenge for any tenure reform is to meet a *social* goal: to ensure that the rural population is not left in a legally precarious position. Providing adequate security of tenure to rural communities is increasingly seen as a condition for, and means of establishing, the rule of law.

In the current circumstances, choosing a tenure policy is, in the final analysis, a political choice about authority systems - customary, state or mixed - and the geographical level at which land management should take place. Irrespective of any judgement about these options, it seems very ambitious to seek to register all land, bearing in mind the cost of maintaining a systematic tenure information system. It is unlikely that the state has the resources to impose systematic registration of transfers and land registers become out of date very quickly, as has happened in Kenya (Okoth-Ogendo, this volume). Cases in which security is ensured through title alone are rare.

Conversely, to give communities the right to define management rules in their own areas (observing the general principles laid down by the state), encouraging legal recognition of local arrangements and facilitating negotiation processes undoubtedly constitute necessary steps. However, when it comes to managing agricultural land, can ambitious approaches based on the common heritage idea really operate effectively on a large scale? What are the conditions needed for "forums" to come up with common rules which are acknowledged by everyone and which clarify multiple claims?[18]

A hybrid and perhaps more realistic option consists of combining community and state safeguards. Some rural communities are attempting to do this, by validating local regulatory mechanisms and providing all stakeholders the opportunity to apply for state endorsement of locally-recognised rights.

One way of doing this, sticking more closely to existing practice, would involve providing an opportunity for administrative/legal recognition of land transactions. Where the parties involved feel the need for it, because their membership of the community does not or no longer offers sufficient safeguards, or where they do not share enough social ties to regulate their relationship, they could formalise their arrangements and set them down in writing for endorsement by the administration. In fact, apart from the risk of having one's land acquired by the state, most cases of insecure tenure relate to transmission of rights (inheritance, loans, sales, etc.). Land transactions should be put on a secure footing, by ensuring that the person transferring the rights has the power to do so and by specifying the content of the transaction. This would guarantee that the beneficiary of the transaction legally receives the transferred rights from someone who actually held them and was entitled to transfer them. Such a 'contractual approach' has the advantage of relying on the written documentation which rural people are quite accustomed to and will often demand (Lavigne Delville and Mathieu, coord., 1999), and on local ways of ensuring security of tenure (Mathieu, 1999; Koné et al., 1999). It provides for great flexibility, covering the whole range of derived rights and market transactions ("outright" sales, lifetime sales of cultivation rights, reimbursable "sales", etc.[19]), providing that the clauses are clear. It is also far less cumbersome than a systematic registration system, since it only needs to handle those situations seen to be "insecure" by one or other of the parties, without implying changes in regulatory methods as a whole. It seems futile to attempt to eliminate legal pluralism in the short term. These approaches clarify and stabilise a limited but crucial aspect of tenure dynamics and the problems of providing secure tenure, by defining :

a) procedures which are both legitimate and legal, flexible and in line with local practices, but sufficiently clear and unambiguous, and
b) written tools based upon local arrangements.

This is only a hypothetical approach for the moment and it is too soon to assess its feasibility and how it could be put into practice. It would probably, like any other approach, involve delicate legal and institutional choices. Various studies are under way on this topic, which should allow some progress to be made.[20]

Debate and experimentation on approaches to security of tenure are still ongoing and it is not certain that genuine responses to the challenge of the tenure issue are yet available. However, even though the desire to take local landholding systems into account still often clashes with a broadly administrative conception of land management, recent experience in French-speaking West Africa has clearly shown what is at stake and which points must be debated. We now have a good appreciation of the situation and a range of varied tools to bring about appropriate legal, technical and institutional solutions, depending on the political choices made by governments. There can be no universal solution, as the choices necessarily reflect the historical traditions of the various states, the current balance of power and their political options. There remains, however, much to do to in the struggle to construct an overall approach which links together these three essential aspects of land management in a coherent, functional, legal, institutional and technical arrangement. Accurate, meticulous legal work is needed, based on rigorous socio-tenurial analysis, and a recognition of lineage rights over land and their importance for maintaining security to stakeholders. A great deal of attention must be paid to practical choices, to define the prerogatives of the various bodies involved, the links between them, and the social repercussions of technical choices. The difficulty lies in defining this framework precisely, while sticking closely enough to existing practices and, at the same time, anticipating how the different players, depending on their reasoning and room for manoeuvre, will try to use

that framework (and its legal or institutional loopholes) and attempt to distort it to their own advantage.

The greatest difficulty lies ahead. The need to clarify political choices often seems to be left in abeyance. This is because political change implies possible risks, and because the current situation favours some sections of Africa's political and administrative class. Beyond the rhetoric about decentralised natural resource management, few countries seem ready to abandon the doctrine of state ownership or even to recognise genuine subsidiarity, and to delegate land management responsibilities to structures that represent the population. The question of drawing up a coherent, effective policy is further complicated by the "features specific to the contemporary African state: mixing up authoritarian government practices and notions of common heritage, together with a degree of inability to control the national territory, thereby leaving local society some freedom of action" (Constantin, 1998). So many factors - the multitude of different stakeholders, with contradictory agendas; the interaction of various government departments; resistance within the political and administrative class, some of whose members see their interests threatened; and the conditionality imposed by funders and experts - reinforce the uncertainty about the purposes of a tenure policy and its precepts. These must be acceptable to both the political/administrative class and the wider population.

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[1] This paper is based on the work of a team of specialists led by the author on behalf of the French Ministry of Cooperation as part of the "Plan of Action on Tenure". The programme of work links with the Franco-British Initiative on tenure of the UK's Department for International Development (see Lavigne Delville, P., ed, 1998; Lavigne Delville, P., Toulmin, C. and Traoré, S., forthcoming; and Lavigne Delville, P., 1998a). However, the analysis and interpretation offered here are the responsibility of the author alone. An earlier revision of this chapter was first published in Politique des structures et action foncière au service du développement agricole et rural, proceedings of the seminar in Réunion, CNASEA/AFDI/FNSAFER, 1998.

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[3] On this subject, it is somewhat surprising to see the term "customary" used in Southern Africa to describe the way tenure and local society currently operate in the former reserves (pseudo-independent Bantustans or reserves tactfully renamed "community zones"), where the African population was dumped in marginal and currently overcrowded areas, used as labour pools for white industry or agriculture. This often involved forced villagisation, compulsory restructuring of land use, the imposition of new cropping methods, manipulation of the "chieftancy" and the establishment of new, tame local authoritiesThere are undoubtedly local social rules and rules governing access to land, resulting in partial social autonomy vis-à-vis state power, but this is far less a reflection of historical continuity than a product of the situation. To speak of "custom" in this case obliterates political and economic history and the fact that social and political reality in the Bantustans is shaped first and foremost by the domination to which their populations have been subjected.

[4] Legislation designed in the interests of the colonial power has also been carried over in English-speaking African countries (McAuslan, 1999).

[5] Le terme de droit "moderne" pour qualifier la législation et les procédures étatiques est particulièrement inadapté, au sens où les législations restent encore fondées sur les législations coloniales, édictées par le colonisateur au début du siècle dans un tout autre contexte, et en particulier sur la doctrine de l'immatriculation. De ce point de vue, elles peuvent au contraire sembler particulièrement archaïques !

[6] Francis, P. For the use and common benefit of all Nigerians: Consequences of the 1978 land nationalisation. Africa 54(3): 5-28. Knox, A. Nigeria country profile. In: Land Tenure Center Profiles. 1998. Kolawole, A. Land reform and problems of access to agricultural and pastoral resources in Nigeria: An overview. In Goree workshop proceedings, IIED/GRET/University of St Louis. 1997.

[7] On the ambiguity of the concept of "productive use", **see** Traore, 1997.

[8] For a discussion of codification approaches in rural France, see Assier-Andrieux, ed., 1990.

[9] The legislative process does not seem to have relied very heavily on the outcome of the Rural Land Plan (Chauveau, pers. comm.).

[10] It is only when the two coincide at production unit level that the term ownership may be used. As a result of dynamic changes in family structure (fragmentation of lineages, splitting up of production units and so on - cf. Raynaut, C. and Lavigne Delville, P. 1997; Quesnel, A. and Wimard, P., 1996), there is no single model per region and different scenarios may be found in the same village.

[11] Even where the customary authorities may be discredited by their involvement in competition over land, the communities may look for regulation along customary lines, **albeit** implemented by new bodies.

[12] Even if local systems limit the rights of "outsiders" (who may still be considered "strangers" after several generations), they can be considered as "inclusive" : when space is not rare, new family groups may be welcomed as a way to reinforce the chief's political influence, and access to land is quite easily granted.

[13] It is inevitable that national policy will have differentiated socio-political effects depending on the local balance of power. The imposition of private property on feudal systems at the time of the French Revolution had differential effects. Where de facto peasant ownership had already been consolidated, this completed the eviction of the land-owning aristocracy and the establishment of a class of small farmers owning their land. Conversely, in Western France, the aristocracy successfully secured the acknowledgement of its ownership rights, thereby transforming tenants into mere sharecroppers.

[14] **See** Blundo, 1996 for an analysis of clientalist, factional land management by rural councils in the Kounghel area of Senegal.

[15] Those who employ this term often forget that registration is a colonial procedure designed to grant considerable rights (stricter than French civil law) to settlers and that it is therefore particularly archaic from the point of view of states which have been independent for nearly 40 years.

[16] Where specific legal status is given to collective appropriation rights to cultivated land, careful attention must be paid, when defining such legal forms, to internal rules and methods, especially as regards decision-making. In particular, it is important to ensure that the various holders of rights are involved in any fundamental decisions (eg. the alienation of a portion of the land), otherwise the transaction will not be valid. Appointing an individual to speak for all stakeholders is not sufficient to prevent abuses of power, and could, on the contrary, serve to obscure any such abuses behind a veil of legitimacy.

[17] I am grateful to J.P.Chauveau for drawing my attention to this point. A sufficiently long period of effective occupation is needed to consolidate de facto situations and avoid the perverse effects of slogans such as "the land belongs to those who work it", where cultivation for a few years, even on the basis of derived rights, is considered sufficient to claim ownership of land.

[18] The question must be framed differently when it comes to renewable resources which are taken rather than produced (wood, pasture, fish) : in a given area, stakeholders may negotiate joint rules governing access and use for themselves. Government intervention could give the inhabitants a legal, exclusive right and validate the management rules by making them binding on third parties. See Bertrand, 1998, on the rural wood fuel market in Niger and Lavigne Delville, 1999, for an analytical overview.

[19] See Lavigne Delville, 1998a, 45-47, for a summary of the debate on sales.

[20] See Lavigne Delville, 1998a, 115-117 for an initial formulation, and Lavigne Delville and Mathieu (eds.) 1999, which gathers together various papers on the way rural people put land transactions down in writing. Research into the dynamics of derived rights and ways to provide security is under way, coordinated by GRET and IIED. A study on land transactions in Burkina Faso is also in progress.