

**COMPETING CONCEPTIONS
OF CUSTOMARY LAND RIGHTS
REGISTRATION
(RURAL LAND MAPS PFRS
IN BENIN)**

**Methodological, policy
and polity issues**

Philippe Lavigne Delville

Les Cahiers du Pôle Foncier

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Liste des sigles

APPI	Production et institutionnalisation de l'action publique (research project)
MCA	Millennium Challenge Corporation
MCC	Millennium Challenge Account
PFR	Plan Foncier Rural

Competing Conceptions of Customary Land Rights Registration (Rural Land Maps PFRs in Benin) Methodological, Policy and Polity Issues¹

Philippe Lavigne Delville²

Introduction

There are strong theoretical as well as empirical critics on such land rights formalization processes, their assumptions, their outcomes. At the end of *“Searching for Land Tenure Security in Africa”*, Bruce and Mighot-Adholla (1994: 261) wonder: *“can we identify circumstances in which systematic or sporadic titling and registration are still appropriate and cost-effective?”*; Bromley (2008 : 24) wants *“to challenge the confident claims from the “development community”(…) that there are “potential large benefits” from titling. One cannot read the extensive empirical record (..) and continue to find this confident assertion tenable”*; Chauveau (to be published) recalls that social sciences have long ago showed the repeated failure of registration processes and asks: *“how is it possible that such a belief can resist to so many empirical evidences”* (my translation).

However, a large number of policy-makers and part of scholars and activists believe that recognising and formalising local or customary land rights is a way of tackling insecurity of land tenure and encouraging investment. But even among them, opinions differ as to why this is the case, how it can be done, and the purpose and methodology of such an undertaking. Is the aim to promote a short-term privatisation of land and an expansion of land markets? Or is it to recognise complex customary land rights in an *“adaptation paradigm”* (Bruce and Mighot-Adholla, 1994)? Either way, how is it possible to ensure that policies will be effective and objectives achieved? In Benin, the issue of rural land rights insecurity has been on the agenda for the past twenty years through two concurrent processes (Lavigne Delville, 2010c). Imported from Ivory Coast (Chauveau, Bosc et Pescay, 1998; Gastaldi, 1998), Rural Land Maps (Plans fonciers ruraux - PFRs) have been tested through pilot development projects funded by French and German cooperation, between 1993 and 2005. PFRs use the systematic identification and mapping of locally agreed rights to land in village territories to produce a map of parcels and a register of rights holders in the locality. Since the vote on the rural land law in 2007, a communal land administration framework is created, and rural actors can ask for “rural land certificates” that provide legal recognition to their land rights. Benin is one of the first francophone African countries to break with the colonial conception of customary/non registered land being incorporated in “State private domain”, under State control³ and transform them into private

¹ A first version of this paper has been presented at the Annual conference on land policy and land administration, World Bank, Washington DC, April 26 and 27, 2010. It has been revised and updated as part of an ANR-funded research project: APPI, production and institutionalisation of public action in Africa.

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³ Inspired by the Torrens system, colonial and post-colonial land legislations are based on immatriculation as the procedure for creating private ownership. Any land that is not registered in this way (and most is not) is incorporated into ‘state lands’, and ‘customary’ rights to such land are denied or recognised on an individual basis.

land⁴, (Lavigne Delville *et al.*, eds., 2009), along with Madagascar (Teyssier et al, 2008; Teyssier et al, 2009) and Burkina Faso (Hochet, 2012; Jacob, 2013) which passed new land laws in 2005 and 2009 and are implementing a land reform on almost the same basis, with an accent on plot formalisation for Madagascar, and on local agreements on land and natural resources management for Burkina Faso (Hochet et Sanou, 2012).

Between 2005 and 2011, with the support and incentive of US MCC (Millennium Challenge Corporation), Benin undertook another land reform process. 294 PFR have been made and more than 5 000 certificates have been issued⁵. A new Domain and Land Code has been passed early 2013, which intend to provide a coherent legal framework based upon a single “Land Ownership Certificate”, replacing both Land Title and Rural Land Certificate and a single land administration body, a National Land and Domain Agency, with local offices in every commune⁶.

In Benin, the majority of land policy actors agree with the principle of using these PFRs as a tool for formalising local land rights in rural areas. PFRs seem to provide a consensual solution to the problem of land tenure insecurity, providing a hybrid instrument that combines the logic of land titling for private property rights with that of securing customary rights. However, the land policy debate showed that beneath the apparent consensus on this tool, divisions over policy visions are sharp, and have created conflicts over field methodology, the legal value of land certificates and the mechanisms for land administration. The same tool (PFR) can be used in different policy perspectives.

In a previous paper (Lavigne Delville, 2010b), I showed that even where the usefulness of systematic registration operations has been demonstrated – and one again this cannot be taken for granted – two key questions need to be addressed: the nature of local land rights, and the manner in which they are administered. I would like here to go further on these issues, through three themes:

- The divergent views on the nature of local land rights in the PFRs and how they should be secured;
- Their repercussions on the choice of methodology and probable impacts in the field;
- Their significance in terms of visions of society and living together.

This will entail more detailed discussion of the strategies for formalising local land rights, which encompass complex ‘customary’ rights and the social and political issues associated with them.

Differing conceptions of the PFR as an instrument for registering local land rights

Three views on the formalisation of local land rights

Procedures for formalising land rights have the dual objective of reducing conflicts over land on the one hand, and encouraging investment and productive land use on the other. Three main approaches to securing land tenure can be identified.

The classic concept of registering land and issuing ownership titles was directly inspired by the standard theory of ownership rights from the 1970s, which is well known and therefore requires no further discussion here. Numerous empirical studies (both sociological and economic) have questioned this concept – or at least, its ‘hard’ form – regarding its interpretation of the past (informality as a cause of insecurity, conflicts over customary rights as symptomatic of the

⁴ I.e. out of state control and belonging to private people, but not necessarily as private ownership.

⁵ UCF/MCA, 2012.

⁶ This Agency is not yet created, and the creation of local offices probably take time.

shortcomings of customary regulations and the demand for titles) as well as its predicted effects in both rural and urban areas (the expected effects of titling, access to credit, increased productivity) (cf. Atwood, 1980; Bruce, 1993; Platteau, 1996; Bouquet, 2010; Colin, Le Meur and Léonard, 2010; Durand-Lasserre and Selod, 2009). Few productivity gains can be expected when there are “imperfections” in the interlinked markets of products, labor force, insurance, etc. (Binswanger et al., 1993). In such cases, favouring land markets will create more inequalities but not more efficiency. This raises serious questions about the justification for land registration programmes (Bruce and Mighot-Adholla, 1994), given the high incidence of ‘market imperfections’ in African agricultural institutional environments.

This view is countered by the community-based approach to land management. In this perspective, the State is seen as the source of problems and conflicts over land, since successive colonial and independent States denied local rights and regulations and have imposed unsuitable normative models, particularly the imported concept of private land ownership. The resulting conflicts are now aggravated by pressure to commoditise land. According to this view, efforts to register land rights (especially individual rights) will prolong these inappropriate public interventions and cause further disruption to local societies. The only way to address the issue of land tenure and resolve conflicts over land is to rehabilitate traditional institutions, restore the authority of local bodies and give local societies greater autonomy in managing their lands and resources. This view tries to take greater account of the realities of rural land tenure in Africa, the fact that customary regulations still prevail in many rural areas, and that public interventions have often been disruptive. However, it tends to underestimate the extent to which rural societies have been changed by state interventions, market development and demographic pressure, while overestimating the coherence of local modes of land management, and sometimes their legitimacy in the eyes of local actors. It also ignores the fact that the fact that land tenure is closely entwined in and flows from social structures (what is called “embeddedness”), resulting in differentiated access to land according to social identities, and the exclusion of young people and ‘outsiders’ from local social spaces.

These two concepts are based on different assumptions and offer radically different responses: the first through ownership titles and security of tenure through titling, and the second through a return to autonomous land management by local communities. In their quest to resolve the contradiction between public and local norms to one or the other’s advantage, both run the risk of limiting their analysis of the local realities of land tenure, and of underestimating the conditions conducive to their proposed policies, as well as the social or political risks associated with them.

A third view is clearly emerging from the results of current research in the social sciences:

- Land tenure in developing countries is characterized by a long-term coexistence of social norms with different origins (arising from local societies’ relative autonomy from the State);
- Land tenure is largely shaped by socio-political issues;
- Therefore, the main issue is a matter of *regulation*, i.e., the process of defining and implementing rules that respond to contemporary issues, ensure that rural actors enjoy full citizenship, and that land tenure relations evolve peacefully, giving no disincentives to investment.

Taking account of the hybrid nature of contemporary land tenure and the great diversity of situations, this approach aims to build dynamic links between local norms and substantive law, and to reconcile legitimacy, legality and actual practice (Le Roy *et al.*, 1996; Lavigne Delville dir., 1998; Chauveau and Lavigne Delville, 2002; Chauveau *et al.*, 2006). While opinions differ over the best balance between local and public regulation, proponents of this view agree on the need to promote (1) a clear legal framework that recognises the legitimacy of local rights and arrangements, provided they do not contradict the fundamental principles of the State, (2) a decentralised institutional framework for land management favouring “legitimate, autonomous and managerial authorities” (Le Roy, 1996) capable of regulating the plurality of norms, and (3) simple tools for upholding agreed rights.

These last two visions are based on a desire to take account of the realities of land tenure, and a belief in formalising land rights in order “increase security of tenure” (Le Roy *et al.*, 1996; Lavigne

Delville, 2006) for multiple rights, rather than privatisation. The primary aim is not to increase productivity or develop the land market. It is to limit the main sources of conflict and ease conflict resolution, thereby encouraging peaceful and effective land use (and indirectly improving productivity, if land tenure insecurity really impedes productivity, which is not always the case).

The PFR: a hybrid response?

The PFR may seem to be a hybrid response that can be accommodated by each of these three views. On the one hand, the underlying logic of this systematic procedure is clearly that of registration: identifying and mapping rights, generating a register of rights holders and a map of parcels. A PFR is then a means of shifting from oral tradition to the sphere of written law. It is supposed to clarify the land tenure situation and clearly define the boundaries of plots, thereby reducing conflict and encouraging investment. It should also be possible to use the land certificates to obtain credit. Once the identified rights have been agreed and made public during the survey and subsequent phases, they are supposed to leave the realm of local/customary regulations and become part of the technical procedure of registering changes in rights (through inheritance, sales, etc.).

But PFRs are also presented as a procedure for recognising customary rights, an alternative to *immatriculation* and land titling, which is the only legally recognised form of land ownership in most francophone countries in West Africa. The ambition is to identify and register locally agreed rights, to “identify all rights”, including – for certain actors – rights to natural resources or assigned to third parties, and individual or collective rights. The procedure is implemented at village level, by teams of sociologists and surveyors. It is supposed to be neutral, providing a ‘snapshot’ of local situations based on parcel-by-parcel surveys, rights holders declaring their rights and having them validated by their neighbours. The level of rights to be registered (individual or collective) is determined by local actors on a case-by-case basis. PFR operations should lead to legal validation of all the different types of recorded rights, with the ‘land certificates’ that sanction this process constituting a new legal status with its own legal standing even if it may be possible to transform a land certificate into Land Title. While the focus is not on recognising customary land management (the shift from oral tradition to issuing certificates for family holdings itself marks a significant change in land management), the basis of the procedure does recognise the legitimacy of different types of customary land rights. New village-level land administration bodies are created, that ensure social legitimacy to land transfers. From this perspective, PFRs are a tool to formalize existing land rights, as they are in the field, with their specificities, without transforming them into private ownership.

However, this apparent consensus is only superficial, due the fact that these three approaches to securing land tenure have incompatible views on local rights and the legal content of land certificates.

Which model of ‘formal’ law? Forced uniformity or dynamic plurality?

Which types of rights can benefit from legal validation following a PFR operation? The answer to this question varies according to the actors concerned, depending on their views on local land rights and the legal categories regulating rights to land and natural resources⁷.

Local land rights: ‘customary-based land ownership’ or bundles of rights?

Despite numerous examples of agricultural intensification under customary regimes (Lavigne Delville et Karsenty, 1998), proponents of registration promote increased individual private ownership as a condition for economic development and a desirable social objective. They tend either to not question the nature of local land rights (as these have to be changed), or to view them in vague and empirically questionable terms of individual or collective ‘customary ownership’.

⁷ See Lavigne Delville, 2010a.

Approaches that are based on securing land rights try to take account of the nature of local land rights, which share several major characteristics in rural Africa despite their diversity. Rights to land and natural resources often form complex sets of individual prerogatives and collective regulations at different levels; thus, rights to land are strongly embedded in social relations (Berry, 1989) and have a fundamentally socio-political dimension in which social identity plays an important role (Shipton and Goheen, 1992; Lund, 2002). However, this does not mean that land rights are rigid, as they are evolving in processes of commoditisation and individualisation (which vary in pace and do not occur everywhere); moreover, such processes do not imply that land relations are becoming completely disengaged from social networks (Chauveau and Colin, 2010).

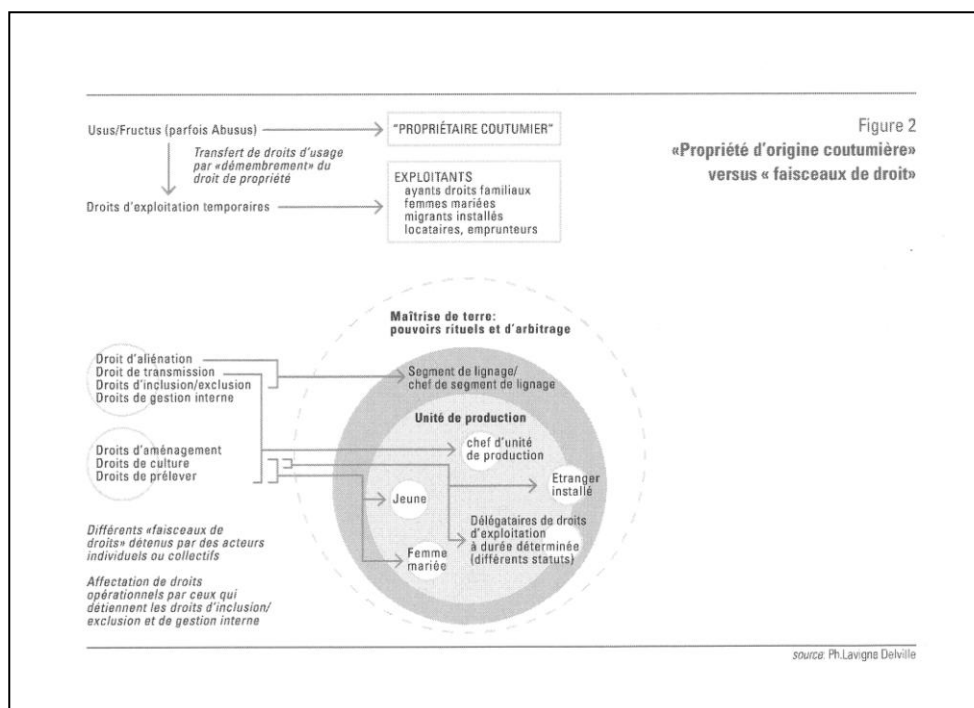


Figure 1. Bundles of rights versus ownership (Lavigne Delville, 2010d)

Finally, in order to understand the dynamics of land tenure, we need to take account of the pluralism created by the co-existence of public and local norms (Lund, 2001), and the fact that social, economic and demographic changes allow rights to be legitimised and contested at different levels, encouraging the politicisation of land tenure and raising questions about regulation and local governance (Le Meur, 2006b).

For all these reasons, the image of contemporary land rights in rural Africa emerging from research into land tenure bears little relation to a vision of 'private ownership'. Approaches based on "bundles of rights" (Colin, 2008) or "land masterships" (Le Roy, 1997)⁸ are much more accurate (Fig.1; see Lavigne Delville, 2010b, for further detail), raising questions about the effects of registration procedures based solely on private ownership, which will inevitably profoundly re-structure or de-structure local rights.

⁸ I will not go into the academic debate on the relations between these two approaches here. In short, the bundles of rights approach emphasises the set of elementary rights held by an individual or collective right-holder while the land mastership approach emphasises the different kind of right-holders and the type of control they have over land and resources. Here, I use the two terms as interchangeable in this paper, since their theoretical differences, which are important when looking at the dynamics of local rights, are not significant to my argument.

The debates on the legal content of Land Certificates

Excepted in countries which have passed new land laws, land ownership in francophone Africa only acquires legal status through Land Titles⁹ issued following *immatriculation*, a “top-down procedure to create private ownership” (Comby, 1998; Comby and Gerber, 2007). This absolute private property takes no account of the rights of third parties, is guaranteed by the State, and was originally designed to meet the needs of colonisers. A century after it was put in place, *immatriculation* rates remain negligible, even in urban areas. Some colonial officers realized as early as the 1930s that it could not be generalized, as the exclusive concept of private ownership had little to do with the realities of local land tenure, and the lengthy and costly procedure was inaccessible to the vast majority of the population.

Supporters of the PFR see Land Certificates as a sustainable alternative to Land Titles. For them, a certificate formalizes locally agreed individual and collective rights and gives them legal recognition. It can be challenged in court, unlike Land Titles which are often considered as irrevocable. According to the 2007 Rural Land Law, Land Certificates can be transferred, assigned and used to obtain credit¹⁰, and are managed at the local level. As such, they provide a new legal status that meets the needs of rural actors, is flexible, evolutive and can be managed locally. Land Certificates are presented by them as the main legal solution to securing land tenure, since access to Land Titles is optional, costly, and ultimately of little use to the majority of rural actors.

However, proponents of the PFR differ in their views on the legal content of Land Certificates. Depending on their understanding of local land rights, some see them as private ownership titles registering individual or collective ‘customary-based private property’; some see them as covering family land holdings, with specific rights for different family members and possible restrictions on the right to sell; while a few other believe that they should be able to formalise all types of rights over land and natural resource.

But other actors regard PFRs only as a stage in the process of *immatriculation*. They do not want to think in terms of an alternative to this process, and see the PFR only as an intermediate tool that can be used to advance *immatriculation* and formalization of private ownership rights in rural areas. The certificate is just a transitional phase for issuing a Land Title, which is their sole point of reference¹¹.

The two main narratives on land rights formalization can thus lead to four different conceptions on the content of land certificates.

⁹ In this paper, Land Titles are associated with the *immatriculation* procedure.

¹⁰ With an ambiguity on what should happen for sales or collateral with collective certificates.

¹¹ After fierce debate, Land Titles are been replaced by “land ownership certificates” in the New Land Code. It is just another name for the same legal status, with the difference that, in case of mistake or manipulation during the adjudication process, people having lost their rights have five years to go to court. In the Land Code, case A and B are mixed together (collective family ownership is possible, is the family becomes a legal entity).

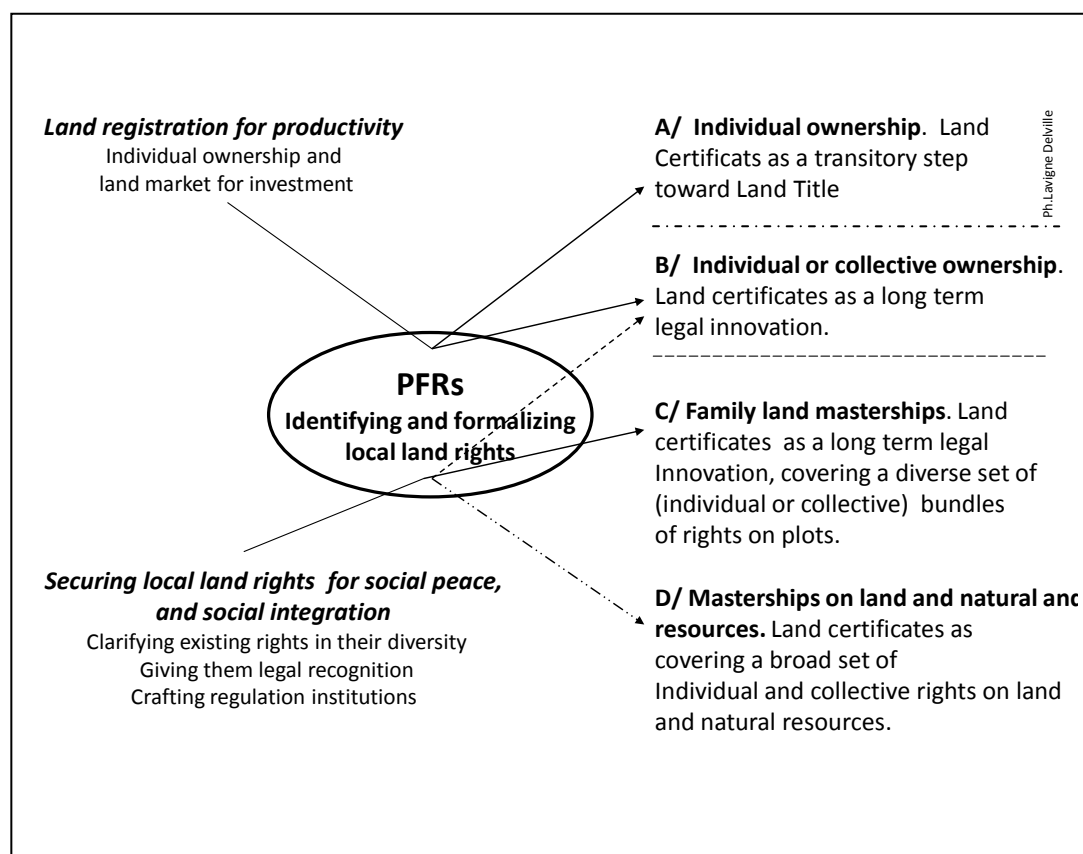


Figure 2. Four conceptions of Land Certificates and the rights that they formalise

Figure 2 above presents a diagram of these four views, showing their links with different ways of securing land tenure. The classical productivity approach leads to conceptions in terms of private ownership, with A being the classical and colonial Land Title and B a private ownership that is not legally guaranteed by the State. Taking more ground of the current diversity of land rights, the “land tenure security” approach can lead to several legal conceptions. In practice, a vision in terms of masterships on land and resources (including pastures, common forest land, fisheries, etc.) (D) is not on the agenda: land certificates are for individual or family agricultural land¹², with an ambiguity on the content of these family rights: are they land masterships, with intra-familial regulation and possible overlapping rights held by other (C)? Or full private ownership held by individual or family groups (B)?¹³

Views on the formalisation of rights, implementation of the tool and local issues raised by the implementation of PFRs

These divergent views partly explain the controversies that have characterised past and present debates on land policies in Benin. In simple terms, one could say that the PFR originally stemmed from the concept of securing local land rights, with little thought given to the nature of these rights. Supporters of the PFR had succeeded in convincing decision-makers working in rural areas of the pertinence of this approach promoting an alternative to *immatriculation*. However, things changed when the MCA Benin reframed the debate on land tenure and the Ministry of Town Planning was

¹² This is a problem since every space, even pasture or forests land, tends to be registered as family holding.

¹³ Cf. fig.1 .

made responsible for land reform, bringing into the debate new actors promoting private ownership, with little understanding of the land tenure issues at stake in rural areas, and/or with corporatist interests in *immatriculation* (Lavigne Delville, 2010c). This global land reform aims legitimately to define a coherent global policy for both rural and urban areas. But in practice, it challenges 15 years of experimentation with PFRs as an alternative to Land Titles for rural areas. For MCA-Benin and the Ministry of Town Planning, PFRs are tools to generalise private ownership. A lively debate between the different camps has been fuelled by varying levels of understanding of the issues and implications involved.

These divergent views have very practical consequences on the field, with possible impact on local populations: when the aim is to foster private ownership, the focus is on plot limits and not land rights; team leaders are surveyors, who are not very interested in detailed survey of rights and aware of the risks of conflict. People see PFR as a mean to renegotiate their bundles of rights toward ownership at the expense of secondary rights holders.

Identifying bundles of rights, where there is a demand for it

In approaches that focus on recognising local land rights, the key issue is for PFRs to establish social consensus on locally held rights. This is what will give Land Certificates their legitimacy, and help reduce conflict. However, experimentation with PFRs has not directly addressed the nature of local land rights, and field studies revealed that they were vulnerable to bias (Edja and Le Meur, 2003). Moreover, PFRs can register only stabilized rights and is not possible to implement in pioneer fronts. The village level approach may be problematic when there is no such a “village” or when village territories are contested or nested. Nevertheless, practitioners have developed a quite fine understanding of local issues, and the survey methodology has been revised in 2005-2007, in order to reduce bias by combining the practical experience of PFR operators with a socio-anthropological analytical framework for land tenure. The revised methodology was intended to “deal with complexity” (Lavigne Delville, 2010b) by:

- Providing PFR teams with land tenure lexicons in the main languages of the country to enable them to work with local groups;
- Identifying the issues and risks through preliminary village diagnostics, defining ways of dealing with special cases, and accepting that PFRs are not always appropriate;
- Identifying and formalising key local norms at village level, and thus recognizing the social embeddedness of the rights held by individuals or family groups;
- Working on guides to socio-land tenure surveys so that they better reflect complex realities on the ground, by focusing on the main level at which rights of administration are exercised and linking surveys on the origins of rights with those on the content of the rights held;
- Training PFR teams on the issues and risks entailed in formalising rights, to enable them to limit the risks of bias during surveys;
- Reinforcing the publicity phase and opportunities for recourse against local social pressures.

Ultimately it is a matter of remaining committed to the ambition to identify existing rights, by mobilising recent findings on the ethnography of land rights (Colin 2005; 2008), taking account of the socio-political nature of land rights and being alert to the main risks of bias during registration operations. This will require teams of agents with experience in social and land issues, and leadership of the survey process. The framework for the survey is not perfect, but significant progress has been made.

As PFRs are not suitable everywhere, the rural land law sensibly and advisedly stipulates that PFRs are to be undertaken in response to demand from the villages concerned; proposing intermediate modes of land management for villages that do not yet have PFRs or have not requested them and thus providing considerable flexibility if this principle of local demand is respected.

Making PFRs a stage in the process of *immatriculation*

This methodology has been contested by the advocates of *immatriculation*, who saw PFRs as part of a pre- *immatriculation* process by:

- Incorporating the technical requirements for *immatriculation* into the PFR procedure, and particularly for plot boundaries demarcation;
- Appointing land surveyors to lead survey teams in the field;
- Disregarding village diagnostics on the grounds that there is no debate on the PFR's relevance for some places.

For them, Land Certificates have to be transformed in Land Titles in a short term. In such a vision, where the objective is to produce individual Land Titles, the diversity of rights is not perceived as a problem. The relevance of the PFR is not an issue, since it is assumed that all rights (supposed to be ownership rights) need to be formalised.

	PFR as a tool for securing local rights	PFR as a tool for <i>immatriculation</i>
Conception of Local Land Rights	Diverse types of rights	No matter
Conception of Land Certificates	Long-term legal innovation	Short term transition towards <i>immatriculation</i>
Decision for PFR	PFRs made on village initiative Generalisation of PFRs as a medium/long-term process	PFRs must be systematic and generalized in the short term in the country's rural areas
Preparation	Village survey to assess demand, understand the opportunities and risks, record local norms, and prepare the plot survey	Village surveys to prepare the plot survey
Surveys	Focus on rights and consensus on rights. Tenure specialists as team leaders. Conflict resolution as part of the process	Focus on boundaries and name of the main rights holder. Land surveyors as team leaders
Plot delimitation	Consensus on limits and local demarcation more important than precise mapping. Intermediate precision to reduce conflicts.	Same norms for PFR and <i>Immatriculation</i> , cement boundary markers

Table 1. Divergent Conceptions of PFRs: Methodological Issues

Table 1 above shows that, although the two approaches are supposed to have the same methodology and regulatory framework, there are clear differences in the underlying field survey practices. In practice, the 2007 Rural Land Law allows for a very flexible and adaptive process for securing local land rights, taking stock of the diversity of contexts, with PFRs being only one option (column 1; see option C, fig. 2). However, a lot of people see it as a mean to generalize PFRs and the registration of land rights, somewhere between column 1 and 2. No Land Policy Paper had been passed before the 2007 Rural Land Law, which would have explained the policy choice between both visions, leaving it to implementation's practices. However, with the new Land Code, villages don't take anymore the

decision to have a PFR; PFRs directly lead to Land Ownership Certificates. The choice is clearly in favour of a systematic registration of private ownership rights (option A, fig. 2).

Risks and conflicts associated with land rights registration policies

Operations to register land rights touch on numerous social and political issues. Cadastral operations provide ample opportunities to politicise land tenure, manipulate rights and exclude certain groups¹⁴. Surveys are not neutral, and what local actors can say during the process depends on both survey procedures and local social relations. Experience in Ivory Coast (Basset, 1995; Bosc *et al.*, 1996) and Benin (Edja and Le Meur, 2003; Le Meur, 2006a; Edja and Le Meur, 2009, Codjo, 2012) has shown that, like any other procedure, PFRs can be used to renegotiate rights and exclude certain stakeholders. Furthermore, the information gathered needs to be rigorously managed and administered by those involved to ensure that the process is not open to manipulation or corruption.

The ambition to take a 'snapshot' of existing rights is something of an illusion, since all registration operations simplify the realities to a greater or lesser extent (Le Meur, 2006). At every step of the process, land rights may be reinterpreted, renegotiated, transformed, as a result of the interaction between the local political economy of land and the skills and practices of the registration teams (fig.3). The risks vary according to the local political issue of land and the vision behind the strategy. The methodology that uses "PFRs to increase security of land tenure" is based on 15 years of practice and input from the social sciences; its aim is to simplify land rights in a considered manner (d'Aquino, 1998) while preserving their diversity and dynamism. It can easily register individual rights, but also protects diverse bundles of rights against third parties and allows family groups to manage their collective rights autonomously.

A private property-oriented approach that does not take account of the rights of third parties will inevitably exclude a large proportion of rights holders, such as:

- pastoralists, people holding rights of passage and harvesting on plots;
- third parties that have negotiated cultivation rights through different types of 'derived rights' contracts (Lavigne Delville *et al.*, 2002). Lineages having territorial control overland and having installed migrants by a "tutorat" relation (see Chauveau, 2006 ; Le Meur, 2006; 2012) will tend to see themselves as land owners and transform migrants into short term leaseholder.

It can also completely alters the nature of internal family relations: in a family group with joint landholdings, all members of the group hold operational rights, and the 'manager' merely acts as the 'trustee' on behalf of this group, with more or less extended administration rights. Land holdings are generally inalienable to ensure that subsequent generations have access to the means of making a livelihood and thus to the status of free men. At least, the sale of any part of the landholding has to be agreed by the family council. Unless the plot is registered in the name of the family group and there are clear regulations for collective family decision about selling or mortgaging the plot, making a collective land holding into a private asset transforms the 'manager', or 'trustee', into an owner in a personal capacity, thereby making all rights holders vulnerable in the short or long term, at the risk of creating numerous landless farmers, at short or medium term. The questionable gains made by applying a model of individual ownership to the complex realities on the ground need to be weighed against the serious social impacts that this will have.

¹⁴ See Shipton, 1988, on cadastral operations in Kenya.

Competing Conceptions of Customary Land Rights Registration

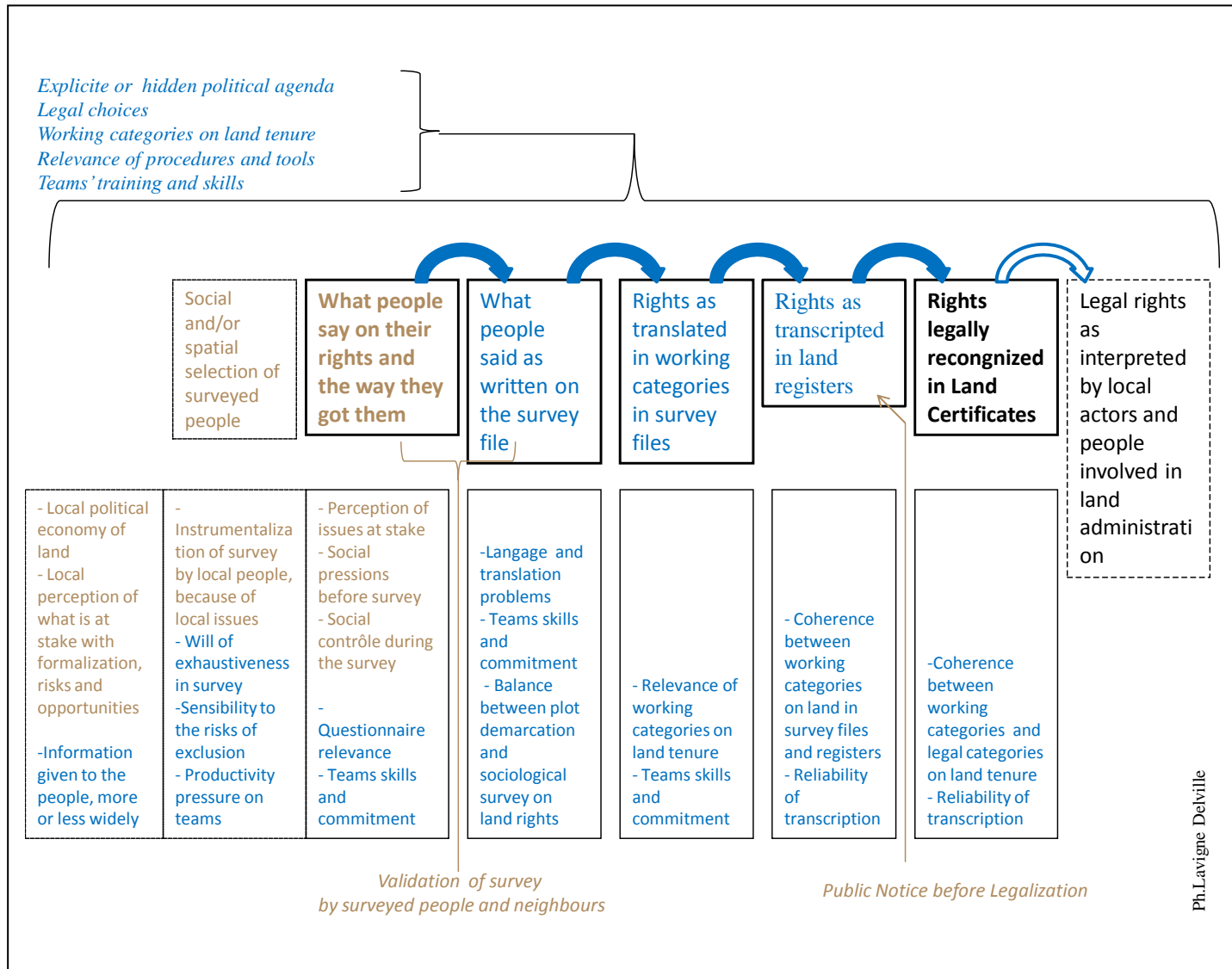


Fig. 3. From peasants' words to legalized land rights. Translations, transcriptions, biases

The situation is exacerbated by insensitivity to these issues during registration operations, which can open the way for opportunistic behaviours and create conflict. There is not only a risk that actors may take advantage of the reconfiguration of rights to exclude others and cause conflict in the medium term, but also that the intervention itself will spark or rekindle conflicts in the short-term. The teams involved in PFR operations are made of young people, often quickly and poorly trained, and led by land surveyors with little understanding of these issues. They have to contend with numerous difficulties, such as:

- villages that have requested a PFR changing their minds when they realise that it will lead to them being granted ownership rights to plots to which they have permanent and heritable cultivation rights, which would cause conflict with the people who currently own the land and allow them to cultivate it;
- worsening conflicts between villages when village territories are muddled;
- customary authorities trying to reinforce their own control over land, in anticipatory strategies;
- village leaders evicting long-living migrants hamlets before registration;
- etc.

The focus on establishing boundaries, and on the teams' productivity and productivity bonuses, plus the fact that they are often led by land surveyors who are largely unaware of the risks associated with the process, also mean that problems and difficulties may be glossed over to make it look as if the process is progressing well, even if actual or potential conflicts that preceded or were created by the process are left behind.

Although there is no in-depth evaluation of MCA PFRs, recent studies show that this risks are real: herders see their access to pasture reduced (Alamou, 2013); community land reserves are sometimes turned into private ownership of land masters' families (Bazin, Halley Desfontaines, Lavigne Delville *et al.*, 2013); migrants are turned into leaseholder paying a fixed rent; sometimes, villagers take back land that had been given long ago to migrants and sell it to urban actors (Codjo, 2012).

Conclusion

Behind the single term PFR, and the broadly similar tools associated with its procedures (surveys, plot surveys, parcel plans, registers, Land Certificates), different strategies and political visions generate a range of approaches, methods, and ways of using knowledge and organising field operations. These differences result in diverse operational strategies, with varying foreseeable impacts.

All operations to register land rights involve political and social issues, particularly when customary rights are concerned, as these have a strong socio-political dimension and are made up of bundles of rights. Such operations inevitably simplify and reconfigure existing rights, as do PFRs.

This may raise questions about the relevance of such a procedure. If reducing land insecurity for farmers is the issue, then it can be asked whether the formalization of rights is the more accurate answer. If formalizing rights is seen as the real issue, then the question is how these rights will be simplified. If the aim is to do this in a considered manner, focusing on the crucial points of insecurity of tenure and seeking to minimise the risks of exclusion in the process, the complex nature of land rights and situations will need to be addressed, sound tools, procedures and operational strategies developed and skilled teams mobilized to deal with them. Or is it a matter of sticking to a single, 'one-size-fits-all' model, regardless of the likely practical consequences of this course of action?

Absorbing land rights or articulating modes of regulating land tenure? Policy, politics and polity issues

Setting aside the issues and risks in the field, the different conceptions of PFRs lead to different political choices, whose underlying paradigms are described below.

Generalising private ownership or bridging the gaps between local/state regulation: two policy options

As we have seen, the two main approaches to PFRs reflect the global debate on land policy orientations: should dynamic local rights be privatised or secured? In French-speaking Africa, this debate is intertwined with the debate on *immatriculation*.

It has been said that current research on ownership rights and the impacts of registration operations has led to caution about the effects of strategies to generalise private ownership. Binswanger *et al.* (1993) clearly demonstrated that taking account of the links between land markets and other markets (for produce, labour, credit, insurance, etc.) has profoundly changed analysis of the possibilities of titling policies: "*If the problems with incentives and risk are not resolved satisfactorily on one market, they have repercussions that spill over onto other markets. Similarly, power struggles, colluding interests and distortions on the markets for labour, credit and agricultural produce result in lack of competition and anomalies in the markets selling and renting land. Many of the limitations of existing analyses of land markets are due to the fact that insufficient attention is given to these two sets of relations between markets*". In other words, where 'significant imperfections' exist on land-related 'markets', as is very often the case in rural Africa, policies to develop the land market will have little economic impact, and are highly likely to have negative impacts on equity. Since local rights are based on bundles of rights rather than *de facto* ownership, the social and political impacts of such policies are also very likely to be negative, with little or no compensatory positive effects on investment and productivity.

Experience shows that land registration policies in Africa never had the intended impact (Chauveau, *op. cit.*). There is no mechanical link between titles and productivity, or between titles and land tenure security. Such a link requires a lot of other conditions: enabling agricultural policies supporting family farming, correct access to inputs and markets, etc. on the one hand; clear land policy framework, reliable institutions, ability to deal with the plurality of norms and to regulate the competition between state and local institution over land, on the other hand. We can reformulate the conceptual framework explaining the links between formalising rights, increasing security of tenure, reducing conflict and increasing productivity, with a stronger emphasis on legal pluralism and conflict resolution (Lavigne Delville, 2010d).

As we saw, economic research as well as social sciences clearly question the option for privatisation, but also for systematic land rights registration: putting every land into registers imply strong simplification of rights; the issue of maintenance of information is the same as for classical cadastres and the risk of collapse is even stronger. Having work around 50 years on land reforms in Eastern Africa, Mc Auslan (2005: 16) concludes "*more and more countries in Africa have seen the futility of attempting to 'abolish' customary tenure*". *There is no reason to suppose that those countries that are still persisting in that misguided policy will be any more successful than those countries which have tried, failed and are now adopting a pluralist approach*".

However, International institutions still promote privatisation and legal monism (id.); national governments increasingly see the privatisation of land as a tool to build an urban medium class. In francophone West Africa, the debate is even more polarised, because it is linked with the issue of *immatriculation* and Land Titles. *Immatriculation* is still the explicit or implicit frame of reference for many actors, who do not consider the extent to which it is a fundamentally colonial procedure intended to fully secure the absolute rights given to colonial settlers, and which has little to do with procedures to register and formalise local land rights framed by history, and even with ownership under the French Civil Code¹⁵. It is difficult or impossible for other alternatives to emerge while those with an interest in defending Land Titles remain determined to confine the debate to “Land Titles or nothing”, with the help of powerful lobbies and international networks that are not necessarily familiar with these issues.

In Benin, the new Land Code abolishes Land Title as well as Rural Land Certificates, to create a new single legal framework, the Land Ownership Certificate (Certificat de propriété foncière). It aims at simplifying the access to Land Certificates, and builds a National Land and Domain Agency (Agence Nationale des Domaines et du Foncier) to adjudicate and administer the Land Ownership Certificates. It wants thus to avoid a dual system with Land Titles and Rural Land Certificates. However, the change is mainly in words. Land Ownership Certificates are almost Land Titles. It is full private ownership with exclusion of others' rights. It will not avoid the problem of transforming land rights through registration discussed above.

On the contrary, people with sound knowledge of existing land practices see Land Titles as part of the problem, rather than the solution, partly because *immatriculation* is a procedure that organises the exclusion of the vast majority of the population, partly because it imposes a framework of absolute private ownership that is contradictory to local realities, and partly because the current land administration is often tainted by embezzlement and corruption. They believe that another hypothesis is required, and that security of tenure is primarily a matter of institutions (Lavigne Delville, 2006), flowing from state recognition of locally agreed rights. Links need to be established between legitimacy, legality and practice (Lavigne Delville, ed., 1998), with more or less emphasis on the diversity of rights, and possibly broader reflection on renewable natural resources.

Bearing in mind the following points:

- the evolution of ownership rights is primarily a historical process linked with economic and social change, although it can be influenced by public policies;
- the existence of partial processes of individualisation and commoditization shows that customary rights are not static and do not prevent the spread of such processes. However, we should not assume that these processes are in place everywhere, progressing at the same pace, and will spontaneously lead to generalised individual ownership within the next one or two generations – the usual time frame for land policies. Therefore, these policies should be framed in terms of an enduring diversity of land rights, with private ownership as one of a range of legal options;
- short-term strategies to increase the spread of private ownership come with huge social risks that outweigh their expected benefits, and legal recognition of local rights is as much about citizenship and reducing conflict as it is about productivity,

Proponents of this view want to work on the basis that the plurality of norms is a sustainable reality, which needs to be organised and regulated rather than unpicked. Therefore, mechanisms to secure land tenure should aim to articulate local and public regulations by providing a flexible institutional framework that will allow key rights to be secured, while leaving local norms to operate relatively autonomously, and focusing on making transferred rights more secure. This strategy aims to offer an institutional framework that reduces the contradictions between local and state norms through land governance institutions, provides strong procedures to formalise transactions and avoid conflicts over them, and allows people who want it to formalise their land rights. When land rights are highly

¹⁵ This Code is much more flexible and pluralist than is often thought because it has had to deal with the complex realities created by past history (easement on privately and collectively owned plots, different forms of collective ownership, etc.).

individualised, where the land market is vibrant, land information systems become useful to be able to localise every plot, as well as affordable, because of the cost of the plots and the frequency of sales. Within this strategy, no impulsion for short term formalisation, but a framework that takes stake of the current diversity of situations, and allows land rights to be formalised on the medium/long term progressively and in step with economic and social change, with or without encouraging individualisation and privatisation.

The conception of land rights as part of the social contract: a polity issue

The scope of this debate extends far beyond the strictly land-related and economic issues to which it is all too often limited. Beyond their sectoral dimensions, land policies reflect concepts of land rights (in all their legally recognised forms) and their administration and, by association, concepts of citizenship, public/private relations, the role of the State in the economy, etc. They define a framework (of varying degrees of breadth and exclusivity) for diverse local land rights, indigenous populations and the most vulnerable sectors of rural and urban populations.

In this sense, the choice of land policy is also, more fundamentally, a political and polity issue. It is a societal choice. Defining or redefining land policies also involves reworking the social contract that links citizens with each other and with the State, raising questions about the basis for living together in a given society despite its socio-economic and political divisions, and about the way to deal with its internal diversity and social and economic inequalities (gender and social inequalities, cultural and political marginalisation of local/indigenous communities, etc.).

The generalisation of *immatriculation* (or full private ownership) is certainly intended to break with colonial and post-colonial dualism and the distinction between “citizens” (with access to the law) and “subjects” (Mamdani 1996), by giving all citizens the opportunity to access private ownership. However, this single legal model poses numerous problems. It will inevitably exclude a certain proportion of the population, and does not allow actors who would prefer their family holdings to be managed by the family to continue to do so. We should not forget that one of the logics of such family holdings is to guarantee all present and future members of family groups access to a livelihood, a form of ‘social security’ against poverty and exclusion that the State is unable to replace.

In a context in which States are becoming more democratic and the post-colonial model of governance (which has reproduced the inequalities and exclusions of the colonial model) is in crisis, one would think that taking account of the diversity of rights and their legitimacy is a condition for building genuinely inclusive citizenship, and that socially inclusive land policies can be a powerful tool for (re)constructing an original and dynamic social contract between the State and citizens. If this is to happen, thinking on land policies will need to take these questions seriously and open them up to genuine public debate.

Articulating land regulations: legal pluralism as an inclusive and workable option

An inclusive approach will need to be based on a broad range of legal statuses, to take account of the diverse realities of land tenure within each country, and the fact that a significant proportion of the population continues to refer to ‘customary’ norms and prefers to manage land use at the level of the (more or less extended) family group. There are two good reasons for that: first, maintaining a family control over land ensures that all present and future members have access to land and thus to a livelihood. In a context of precarious modernity (Laurent, 2013), where State is unable to provide some “social security” against the risks of life, family networks are still the main source of social security ; second, “so long as the performance of State legal, administrative and judicial institutions have not proved that official frameworks and procedures are more effective, most actors will still rely on more

or less customary and hybrid forms of social control and regulation” (Hesseling et Le Roy, 1990 : 11; my translation).

Just as there is no way forward with the legal dualism of colonialism, which organises the exclusion of most of the population from access to the law, nor does the re-absorption of this dualism by the short-term extension of private ownership seem to be a viable option. Therefore, conviction or pragmatism dictates that we need to learn to think in terms of legal pluralism, build on diverse sources of rights, and to organise this coexistence of norms within a public mechanism (Le Roy, 2012; McAuslan, 2005; von Benda-Beckmann, 2002).

This does not mean that anything is fixed, or that rural actors should be restricted to family collectives. Such an option is by no way a glorification of “custom” and tradition. It takes stock of the dynamic of local/customary rights and of state/society interactions. It is a matter of recognising and organising the diverse modes of regulating land tenure, not trying to lessen them in the short term; something that does not preclude the processes of individualization or commoditization, but gives them a framework.

Analysing the different conceptions of land policies, Bruce and Mighot-Adholla (1994: 261-262) call upon African governments “to redirect attention to more incremental approaches to changes in indigenous tenure systems... We should be moving away from a 'replacement paradigm' in which indigenous tenure is to be replaced by tenure provided by the state, towards an "adaptation paradigm". An adaptation paradigm requires a supportive legal and administrative environment for the evolutionary change in indigenous law. Such a supportive environment implies a clear recognition of the legal applicability and enforceability of indigenous land tenure rules”.

The debate surrounding PFRs shows that this paradigm of adaptation is not accepted by everyone. Full replacement strategies involving top-down *immatriculation* without any reference to local rights are clearly outdated. Current replacement strategies promote the rapid *absorption of local rights into a framework of private ownership*. In adaptive strategies, however, the purpose of land policies is to provide a dynamic institutional framework and one has to think in terms of a *dynamic articulation* between local and public land regulation. This choice does not anticipate the long-term outcomes of change - which may include State-driven initiatives aimed at progressive individualisation (see Table 2 below).

Aim	Short-term extension of private ownership		Progressive evolution of property in a regulated framework			
	In terms of <i>immatriculation</i> and Land Titles		In terms of private ownership, outside Land Titles	Towards individual private ownership	Towards sustainable and progressive articulation	
Preferred legal status	“Top-down” <i>immatriculation</i> with no reference to local rights	A. <i>Immatriculation</i> based on local rights	B. Private ownership recognised by the State, along with Land Titles	C. Family land holdings (and private ownership), with knock-on effects on individualisation	C Family land holdings, private ownership	D. All types of land use and natural resource management
Paradigm		<i>Replacement</i>			<i>Adaptation</i>	
Strategy	<i>Direct substitution</i>	<i>Absorption (= soft substitution)</i>		<i>Articulation</i>		

Table 2. Aims of land policies, paradigms and preferred legal status

In West Africa, the dynamics of land tenure and the socio-economic issues clearly point to a preference for this strategy of dynamic articulation between different modes of regulation. Within that option, there is still a large set of political and institutional choices, on the rights, norms, and authorities to be recognised, on the balance and modes of hybridation between local and state regulation. Seeing PFRs as a possible tool, on village will, within an institutional framework where local norms are recognised and land transactions formalised, the 2007 Rural Land Law could have allowed for such a strategy.

But international pressures and elites interests put the emphasis on “monists” solutions and on privatisation, supposed to be a solution to food security and agricultural development without taking stock of the state of knowledge. The polity issues are most of the time darkened. Can land policy debate open to these polity issues without strong pressures from society?

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Summary

The formalisation of local or customary land rights is often seen as a means of tackling insecurity of land tenure and encouraging investment. Several tools, such as the Rural Land Plans (PFRs) used in Benin, seem to resolve the tension between the logic of registering rights in order to increase productivity and the logic of securing complex local rights and reducing conflict. But while PFRs are potentially a good tool for dealing with complexity, current policy debate in Benin tends to focus on them as a tool for privatisation. But given the diversity of local situations and complexity of land rights, a single model of private property will inevitably engender exclusion and conflict, for questionable economic benefits. We can think that what is needed is a pluralist vision, and rights registration procedures that build sustainable links between diverse and evolving local modes of land regulation, on the one hand, and a pluralist legal framework on the other.

Keywords

West Africa, Benin, land policy, customary land rights, methodology, social and polity issues

Le Pôle Foncier

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