

**Securing secondary rights to land
in West Africa**

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DERIVED RIGHTS: NEGOTIATING ACCESS TO LAND

In West Africa, land questions are rising in importance. As pressures on resources increase, farmers need sufficient tenure security to encourage production and investment in land. The procedures governing access to and control over land are of vital importance in promoting intensification and commercialisation of agriculture, combating poverty, and reducing risks of conflict. At the same time, the processes of decentralisation and establishment of new local government structures raise the question of which institutions should be responsible for land management. The last ten years have seen a growing body of experience with new approaches to land policy and interventions.

Current approaches to land tenure: a growing recognition of local rights and institutions

The land tenure issue in much of Africa is characterised by the co-existence of different systems of regulation – governmental and traditional/local – which often overlap and contradict each other. Rural people rarely have access to formal legal procedures, due to large discrepancies or contradictions between legal texts and local realities, the complexity and cost of the procedures involved, lack of awareness of legal provisions, and so forth. As a result, their rights exist in a state of legal limbo, which puts them in a position of considerable insecurity. Local institutions, rules, and procedures still provide much of the basis for how land is managed in practice. In some cases government officials rely on local arrangements, even where these are in contradiction with the law, because formal legal provisions do not enable them to resolve the problems brought to them by the people they are meant to administer. But these local ways of handling land affairs are either ignored or, at best, tolerated by the law.

Against a background of increasing competition for land and natural resources, this situation tends to generate multiple, conflicting claims. It results in disputes which are very difficult to resolve, given the proliferation

¹ Cf. the various pieces of work carried out as part of the Franco-British initiative in respect of land and natural resources (MAF 1998 IIED, 1998 ; Toulmin and Quan eds, 2000; Lavigne Delville ed, 1998; Toulmin, Lavigne Delville and Traoré eds, 2001; Roehgude, 2000).

of regulations and institutions. Each party tries to exploit the plurality of rules and sources of authority, to take whatever advantage they can of their social or financial position.

Despite this confusion and instability, local forms of regulation are emerging, based more on social networks than precise rules, enabling systems of access to land to adapt and change with a degree of success. At the same time, the limitations of state management of land are generally recognised, as are the inaccessibility for most people of official procedures for registering rights over land. The introduction by government of private land titles “from the top down” also seems ill founded, as shown by recent research and experience from the field (Platteau 1996; Bruce and Migot-Adholla, 1994; Shipton 1988; Chauveau 2000a). However, a policy of registering land rights should not be ruled out, since there may be circumstances where this makes most sense (Firmin-Sellers & Sellers 1999). Given that the co-existence of different systems of regulation is going to continue for some time, the only option is to manage the situation carefully.

Research on land tenure, political shifts towards democratisation and decentralisation, and experience gained from recent land policies all tend to argue in favour of a pragmatic approach to land tenure, based on the following principles:

- x recognising the dynamics of local land tenure systems and their capacity to adapt to changing circumstances;
- x getting away from the dichotomy between formal law and local practices; we must start by recognising the existence of rights and institutions operating at local level, even though the state may wish to transform and integrate them, in the long term into a single common framework;
- x proposing a range of measures which will enable different land users to achieve greater security, without making registration of title the only procedure for achieving recognition of rights to land

This means adopting a pragmatic approach to security of tenure. This should not depend exclusively on the establishment of legal rights of ownership but establish a process whereby rights, and the assigning of rights, are recognised

² These rights may be of different origin – official procedures, membership of a community, a transaction based on customary practice – and different kinds: rights of access, use, administration, transmission, disposal. (cf. Le Roy, 1995, for the different kinds of rights).

and guaranteed by clear procedures which are perceived as legitimate by the various groups of actors concerned.

The principles noted above set the scene for current debates on land tenure policy. They leave room for a wide range of choices and options, depending on economic circumstances, social and political background, and the broader policy framework. At the heart of the debate is the need to recognise local land tenure systems and, in particular, local procedures for land tenure regulation. Important considerations are:

- x the degree of autonomy allowed to local systems of land tenure;
- x the degree of subsidiarity permitted in land management.

On a policy front, several West African countries have tried to simplify land rights registration procedures, while others have redrafted land tenure legislation (as seen by the re-formulation of the Réorganisation Agraire et Foncière in 1996 in Burkina Faso, the Rural Code in Niger, the 1998 Law on rural land in Côte d'Ivoire). Different operational approaches are also being tried. They lay stress on recognition of actual rights and associated procedures for regulation and arbitration. They include the introduction of rural land plans (Côte d'Ivoire, Benin, Guinea, Burkina Faso), measures aimed at improving security of tenure and heritage management (Madagascar), registration of village lands in Mozambique, registration of rights at village level in Tigray region (Ethiopia), Land Boards in Botswana, and local by-laws and conventions (Mali, Burkina Faso).

The significance of local derived rights to land

The debate on land tenure has tended to focus almost exclusively on the issue of land privatisation, and hence on permanent, transmissible ownership rights, whether acquired by inheritance or deed of title. "Although they clearly play a very important role in real-life agrarian situations, the various forms of land use by people other than the owner seem to be very much underestimated in the debate on the land tenure question, which continues to focus on ownership and property rights" (Le Roy, 1998 : 87).

Derived rights of access to land, whether they are traditional long term loans or more money-based forms of access (like tenancy or share-cropping), are very common in many farming areas. They are flexible arrangements, which enable farming systems to adapt to changes in economic conditions. They play a vital part in local land relations and have grown in importance with the

increase in rural migration. In much of Africa, the opening up of pioneer farming areas has relied heavily on the forms of derived rights by which means migrants have been able to gain access to land.

When we refer in this document to “derived rights procedures”, we mean mechanisms whereby one person negotiates and obtains from a third party, the right to exploit a plot of agricultural land on a non-permanent basis, on a variety of terms. “Derived rights” include a wide range of possible arrangements, from traditional open-ended loans of land to short-term tenancies, but all involve a non-permanent transfer of farming rights to the land user.

A certain amount of agricultural output is accounted for by farmers working lands which they control or which have been allocated to them through inheritance.³ But many farmers also cultivate plots of land owned by another with whom they have negotiated a right to farm the land. “Derived rights procedures” is the name we have given to the various institutional arrangements whereby holders of property rights (whether based on inheritance, deriving from earlier clearances, etc.) assign, on a temporary basis, the rights to cultivate a plot of land (and possibly exploit the trees which grow on it) to a third party who is not a member of the family group. The word “rights” is used here in a descriptive sense (describing the various locally recognised prerogatives and duties), rather than in the legal sense of the term.

The term “derived rights” therefore includes all means by which people gain access rights to grow crops on agricultural plots controlled by third parties, from open-ended loans of land to tenancies or share-cropping agreements. The term is intended to stress the contractual relationship between the two actors and the continuum between the various possible forms of arrangement.

Recent developments relating to the “derived rights” are not generally understood and have received little attention from governments and legislators. Much land tenure legislation does not even mention them: legislation relating to rural leases applies only to plots registered as privately owned, while texts which refer to “customary” rights explicitly or implicitly limit their attention to property rights based on clearance or inheritance. The procedures that concern us here therefore fall outside the scope of the law.

³ Cf. Faye and Benoit-Cattin, 1972, for an analysis of agricultural holdings in the Sudan/Sahel region of Africa, and le Roy (2001)

In cases where policy makers have taken derived rights into account, it has generally been to impose a ban on them either in the name of the state monopoly on the administration of all non-registered land; or because of a misguided view of the "family farm"; or for ideological reasons (sharecropping, for example, has often been viewed as inefficient or tending to give rise to exploitation by the landowner of the tenant).

Recognising the dynamics of local land tenure systems inevitably calls such ideas into question and demands a better understanding, based on field-level evidence, of the forms and procedures for assigning farming rights. It also raises a number of important questions: What forms do derived rights procedures take? What role do they play in the evolving land tenure system?

Do

be central but the contract often also includes clauses relating to what constitutes appropriate (or inappropriate) behaviour on the part of the tenant, various forms of assistance to be rendered to the owner and so on.

The range of possible arrangements is very wide indeed. The conventional categories (gift, loan, tenancy, sharecropping) cannot be used without qualification, because these terms are too broad and may give rise to misunderstandings. But one needs to describe carefully the content of the arrangements, since the detailed conditions associated with a given kind of agreement is often highly location specific⁴. Different arrangements can be described and analysed in relation to their characteristics, as shown below.

An arrangement can be described mainly in terms of:

- x the scope of the rights granted (nature, length of time, possibilities of renewal);
- x sharing of inputs used for the growing of crops;
- x sharing of responsibilities in the production process;
- x forms of remuneration and terms of payment;
- x the extent to which the terms of the agreement are negotiable;
- x the procedures for setting up the arrangement;
- x means of ensuring that commitments are met by each party.

Some of these clauses will be “contractual” in nature, and therefore subject to explicit negotiation between the parties, but derived rights arrangements often also contain “conventional” clauses, which derive from local custom, but may not be the subject of open discussion.

To understand how these arrangements work in a given situation, it is also necessary to be aware of:

- x the economic and social status of the different parties, the relationship between them, their social obligations, and so on;
- x the factors of production they possess, the nature of the “market” in these assets, and the reasons for their entering into the arrangement;
- x the type of land or crop concerned;
- x the means of managing any disputes that might arise.

⁴ For instance, where pledge contracts are concerned, the term *garantie/ahoba'* in Côte d'Ivoire can take different forms: at Zahia, the borrower must pay back the capital in order to recover his plot of land, while at Bodiba the plot is handed over for a stated length of time (generally 2 years). The produce of the plot during this time is then deemed to have paid back the loan in its entirety, both interest and capital.

⁵ The final research report includes a fuller breakdown.

Any agreement must also have a means to ensure that commitments are respected and the rules enforced. Such mechanisms may take the form of social sanctions against those who transgress the rules, clauses embedded in the contract itself, mutual acquaintance and trust between the parties, the right of appeal in the event of a disagreement, etc.

Looking at these institutional arrangements by which people gain access to land and procedures for negotiating rights between the parties concerned open up a new set of perspectives in understanding the dynamics of land tenure. Such an approach enables us to see how things work in practice, rather than relying on an analysis of the formal legal framework or the general principles of customary law. An approach of this kind may also help to analyse land tenure relations within family units (access to land for women or those holding junior social positions within the family) as well as access to natural resources (pasture land, woodlands, etc.). However, in order to maintain a focus on a limited set of issues, this particular research project chose to concentrate on transfers of rights to use agricultural land and/or the trees growing on it, by the land rights holder to third parties not belonging to the family group.

A few broad categories but many variants

Between three and fifteen different arrangements for gaining access to land were identified in each of the locations studied. Each involved a combination of different elements and could be classified in one of several broad categories. The diverse arrangements stem from the characteristics of the farming system, the social history of the region, and the economic environment. Where there are trees growing on land being let to another, the right to exploit the trees and the right to farm the land are often granted separately to different persons. Because of its higher level of fertility, and the shrub re-growth which it supports, fallow land is often subject to special terms, particular in areas where good land has become scarce. It is essential to describe these various arrangements with care, in order to understand how they operate, and avoid oversimplification when comparing two different areas. However, for all their diversity the arrangements we found can be grouped into five broad categories.

„ **Open-ended long term loans** apply to plots of land that have already been cleared from bush or forest land, and thereby belong to the family of the original clearer. Once all uncleared bushland has been exhausted, strangers

wishing to settle are offered long term loans of this sort. They are then connected by relations of patronage to the land-owner to whom they must pay an annual fee which, although often of largely symbolic value, makes explicit this dependence on the landlord. However, the terms of such agreements vary, for example in how the land can be recovered by the owner, or passed on to descendants. Such loans are still the main way in which rights are assigned in areas where there is little pressure on land.

„ For a long time, **short-term loans** have been mainly associated with responding to an urgent immediate need, but are now becoming the rule where pressure on land is increasing or where the land-owner fears losing his rights over land if it is given out under a longer term arrangement.

„ **Tenancies** are fixed-term contracts (varying from one season to a number of years), with payment fixed in advance. The rent must usually be paid at the beginning of the season, where this is in the form of cash, or at the end of the season, when paid in kind.

„ **Share-cropping contracts** cover a wide diversity of arrangements, some of which involve gaining access to land while others are simply labour contracts the labourers being paid a share of the produce after the harvest. What distinguishes one from another is how far the two parties are involved in the productive process and in decision-making. In addition to the share of the harvest each enjoys, their respective remuneration depends on two other key factors: how the production costs are shared and who controls the work of the tenant. Contracts of this kind may apply to both **annual and perennial crops**. In the case of perennials, the contract may be limited to different ways of sharing the tree harvest, but may also include both trees and food crops, access to crop land being regarded as payment for the work invested in tending the plantation. Terms differ considerably depending on whether the contract concerns the creation, or maintenance of a plantation. In the first case, the duration of the contract must be sufficient to allow the tenant to recoup the investment required, since there will be a period of several years before the trees start bearing.

„ A variant of this is a **contract involving a share of the plantation** created as a result of the tenant's labour. In situations where land is relatively abundant, an arrangement of this kind makes it possible for a tenant to create and develop a plantation, which is subsequently divided into two. This is advantageous to both the land-owner (who does not have to pay any labour

costs throughout the period) and the tenant (who gets through the early years before the plantation has started bearing by growing food crops between the young trees). It is the tree capital, in the form of the plantation, not the land itself, which is subsequently shared. This tends to give rise to ambiguities and conflict, where the tenant interprets the agreement in terms of their having acquired rights over the land itself. Disputes are especially likely to arise when the plantation reaches the end of its productive life and the land owner seizes the opportunity of taking the land back.

„ Some contracts allow for **access to land in return for labour services**. The labourer is rewarded for his services by being allocated a plot of land to farm. The navétanā is one such example, but this type of agreement is also found in other circumstances, such as when the person seeking land to cultivate owns equipment, such as a plough-team, the services from which can be traded for access to land, as in Burkina Faso, or when a person acting as caretaker of a plantation is rewarded by being granted a right to grow crops between the trees.

„ Finally, different forms of **land pledge** involve the delegation of rights of access to land, since the person giving out the loan can use the pledged plot until the loan has been repaid.

Particular arrangements meet the needs of different parties, and can take into account of requirements: not only access to land and labour, but also the need to grow food, access to technical know-how, availability of farm equipment, credit, etc. The choice of arrangements and the terms of the agreement need to be understood in the light of the needs and strategies of each party. Analysis of this kind is essential to avoid unsubstantiated value judgements and simplistic conclusions.

Dynamic arrangements to meet changing needs

The range of possible arrangements in a given region is by no means fixed. Research shows that there have been significant adaptations over time, in response to changing circumstances.

There are many factors influencing the relative scarcity of productive assets and how they are distributed among different producers: the relative prices of

⁶ Seasonal labour migration to the groundnut basin of Senegal, from the 1940s-50s.

farm inputs and outputs, new crops and techniques, changes in public policy and political circumstances, the appearance of new interest groups, and changes in social values. All of these are likely to have an effect on derived rights arrangements. We need to be aware of them in order to understand the motives which drive people to seek or let out land, and the relationships to which they give rise.

Three factors emerge from the studies as being of particular importance:

- x **the impact of government policy:** in Senegal, Burkina Faso and Niger the slogan “land to the tiller”⁷ has led to a sharp fall in long term loans of land, with those giving out their land to others seeking to protect themselves from the danger of land claims to this land on the part of land borrowers; in Côte d’Ivoire, given the earlier political pressure to welcome foreign migrants and the ban on tenancy arrangements, local people have developed forms of “patron-client” relations, in which the dependence of those seeking access to land is clearly and continually reinforced through payments of labour and in kind;
- x **the growing need for cash:** shortage of money seems to be an issue underlying many decisions to pledge land, to sell land or grant tenancies. Leasing or pledging land is a means of gaining access to cash in the absence of formal credit markets. Contracts involving the sharing of produce are also frequently motivated by a lack of ready cash, either because the owner of the land lacks the means to pay the labourers he needs to work the land, or because the tenant cannot meet the costs of the rent and farm inputs at the start of the season;
- x **old arrangements abandoned as one generation takes over from another:** this phenomenon is particularly noticeable in former pioneer farming areas, which 30 years ago experienced mass in-migration, new settlers having been given access to land through relations of patronage with a ‘landlord’. The sons of local landowners are now claiming back land formerly let out to migrant farmers. At the same time, sons of those migrants feel too that they should be able to assert firm claims over land which their family may have been farming for a generation or more.

While “traditional” forms of gaining access to land have persisted in some areas, in other regions undergoing very rapid economic and social change, new institutional arrangements are emerging alongside or replacing earlier forms. They tend to be more based on money than before, though this is not always the case. In Ghana’s citrus and oil-palm growing areas, for instance,

⁷ In French : “la terre à qui la travaille” .

forms of share-cropping have replaced outright sales of land as the dominant means to gain access to land.

Research has also pointed to the appearance and spread of tenancy agreements in which the duration of the contracts is now clearly specified. Because the duration is made explicit, arrangements of this kind give greater security to the landlord, since he knows he can reclaim the land at the end of this period as well as a steady stream of income. Provided that the rental payments remain affordable and the duration of the contract corresponds with the requirements of the crops being grown, such arrangements can also serve the tenant's needs. There is therefore evidence of great capacity at local level for institutional innovation in response to changing circumstances.

“The really striking phenomenon we observe is the diversification and multiplication of arrangements between different parties to allow, justify and guarantee access to land in a situation of intense competition. The resulting agreements are undoubtedly based in part on the interests of the particular parties concerned, but are also sustainable and recognised by others. They cannot be explained away as ad hoc agreements; they tend to combine, on the one hand, the use of standardised regulations which provide collective legitimacy and, on the other, specific elements which are socially tolerated, if not advocated, to maximise the advantages they offer each party to the agreement (Chauveau, 1997 : 345-346).

Efficient and secure arrangements

On the whole, derived rights arrangements allow for efficient solutions to be found to the unequal distribution of production factors required for farming - land, labour, technical and financial capital, access to commercial networks, etc. - in a context where markets are imperfect or non-existent and there are many risks, whether of opportunist behaviour, or those linked to harvest failure. The impact of these arrangements in terms of fairness is more complex, and cannot be analysed in the abstract, divorced from context. It is particularly when cash crops require significant capital investment that derived rights arrangements may act in favour of large land owners. However, impacts on equity are less a consequence of such contracts in themselves and more the result of the underlying distribution of key assets and local power relations.

The degree of insecurity associated with derived rights arrangements is also rather variable and depends very much on context: such as, the level of competition for land, the relationship between the parties concerned, or the effectiveness with which land tenure is regulated. Overall, derived rights arrangements do not seem to cause a great deal of insecurity. They depend on the relations which exist between the parties and the extent to which commitments are respected depends very much on the quality of the relationship itself. It is not the oral or informal nature of the contract in itself which causes major problems, so long as the conditions are explicit and the regulation mechanisms work properly. The cause of most trouble stems from poorly functioning procedures for resolving land disputes. It should be noted that some conflicts are due to issues arising which had not been given explicit attention when the arrangement was entered into. In such cases, the arrangement itself offers no solution, or at best is open to conflicting interpretations. For example, was the right to recover possession of the loaned plots explicitly stated or not, after what length of time and under what conditions? Was access to adjoining land within the area allocated included in the agreement, or not? In the case of some money-based arrangements, which are new and may not be widely recognised locally, the vagueness of certain clauses also tends to give rise to dispute.

“The delegation of access rights to land by means of agrarian contracts is now seen by economists as the best way of ensuring a distribution of land as a productive asset which is both efficient (given market imperfections and the existence of risk) and equitable (because of the inverse relationship between size of farm and productivity favours family farms) – regardless of the underlying distribution of land and any rigidity in land markets” (Colin, 2001).

IMPLICATIONS FOR LAND TENURE POLICY

Restrictive regulations generate counter-productive effects

Recent findings from socioeconomic studies show why it is a mistake for governments to try and restrict derived rights arrangements. When governments attempt to suppress or restrict such forms of agreement, without at the same time offering an alternative solution to the very real problems facing farmers (market imperfections, uncertainty, lack of capital, etc.), there is a serious risk that the results will be counter-productive, in terms of efficiency and equity.

Various adverse consequences may result, such as an inability for farm size to adjust to changing asset availability and economic opportunity, a fear amongst land owners that they risk losing their land to tenants and, hence, a fall in the amount of land available under tenancy, the emergence of an underground market in land access with higher associated transaction costs, heightened insecurity, and so on.⁸

An improved understanding of the role played by agrarian contracts raises serious questions as to the wisdom of introducing regulation. The vast majority of economists now recognise the value and efficiency of such contracts, particularly in situations where markets are far from perfect...“ although the market in transactions cannot completely eliminate structural obstacles and achieve perfect efficiency in the distribution of land in a given economy, it can go a long way towards achieving the desired end” (Deininger and Feder, 1998:26).

Current developments in the theory of institutional economics certainly demonstrate the importance of background study before making a recommendation for policy in respect of derived rights. Moreover, they clearly stress the need for prudence in introducing any form of regulation, which might prevent the continual evolution of land tenure relations, and straight-jacket processes which need to change over time, while generating a range of counter-productive effects. In view of the above, would it be better if debates regarding land tenure did not discuss derived rights? Might their current low profile not be the best guarantee of their autonomy and efficiency?

Not all land tenure regulation is necessarily counter-productive. Deininger and Feder, for instance, point out that regulations protecting tenants, particularly from eviction, do have a potentially disincentive effect on the land-owner. On the other hand, protection of tenants provides them with an incentive to invest in the land and may strengthen their hand in negotiations with their landlord.

As well as engendering possible counter-productive effects, there are several other factors which underscore the need for prudence in trying to codify derived rights procedures:

⁸ Otsuka et al. (1992) note that the small number of studies which have come to the conclusion that share-cropping is inefficient have been carried out in situations (India or Bangladesh) where the choice of contractual arrangements is restricted by law.

- x The diversity and flexibility of derived rights stem from and help meet the needs of a particular farming system. Attempts to regulate them within a restrictive framework could impede the continuing evolution of agricultural production and intensification;
- x Trying to define a legal status for derived rights raises almost insurmountable legal difficulties, given that most land is not formally titled, nor is it likely to become so in the medium term;
- x In this area, even more than in others it is unlikely that the state would have the means to implement its policy effectively; issuing regulations without being able to verify their implementation would simply add further to the confusion regarding rules and procedures on land tenure.

Imposing unrealistic regulations and codification of derived rights are not therefore the route to take. On the other hand, in some regions, problems have arisen as a result of:

- x the negation of derived rights by government and the legal and institutional insecurity that it has engendered;
- x limits to local institutional innovation and procedures for regulation;
- x the constraints of the broader context and situation in which the various actors negotiate their contracts.

Where problems of this kind have arisen government needs to take action to limit the damage and provide greater security to the various parties involved.

The evolving procedures through which people gain access to land are driven by the interaction between the interests of different actors, recognised rules and conditions, bilateral negotiations and opportunistic behaviour. It would seem best for the state to propose tools and procedures which help to stabilise the most important aspects of land tenure dynamics – and so facilitate access to the procedures provided for by law – but without constraining the institutional evolution underway in many areas.

Recognising the legitimacy and dynamism of derived rights

Acknowledging their existence and legitimacy

Currently, derived rights receive little official recognition. This generates differing and contradictory interpretation of their status and contributes to the unpredictable manner in how conflicts are resolved. For progress to be made in this area requires:

- x official acknowledgement of the existence of derived rights of access to land, as a normal element within all land tenure systems and a positive factor which contributes to agricultural production;
- x recognition of their key characteristics which allow them to play such a valuable role (the diversity of functions they fulfil, their flexibility and dynamism, their responsiveness to environmental conditions and market imperfections, etc.).

This recognition should be explicit and enshrined in the principles to be taken into account by those responsible for land tenure issues, whether in development agencies or those in land administration. This would encourage a more coherent approach by government. At present, in the absence of clear instructions, the attitude of local administrators when faced with disputes relating to derived rights depends more on their personal interpretation and judgement than on any official policy. Now that local rights over land have been given much firmer recognition by many West African governments, such acknowledgement needs to broaden to include derived rights arrangements as well.

This will mean doing away with slogans such as “land to the tiller”, which ride roughshod over complex overlapping rights of appropriation and use. In its place must be established the principle that land should be farmed within a framework of rules that are both legal from the government’s point of view and perceived to be legitimate by local people, because they are founded on local realities. It means doing away, for example, with restrictions on land sales, as such measures tend merely to encourage the growth of a black market in land. There are appropriate measures for regulating transactions other than outright bans, as discussed below.

Can derived rights gain legal status?

The diversity of derived rights arrangements and their great flexibility make it impossible to codify them, at least at national level. It also makes it hard to provide a rigid definition of the conditions and clauses these agreements should contain, the rent to be paid and so on. It is worth remembering that, even in France the content of tenurage agreements, such as rentals and share-cropping, was left in the category of “local usage” until the 1960s, i.e. until the days of small scale peasant farming came to an end, and agriculture increasingly came to be dominated by commercial businesses. In addition, the desire to give derived rights legal status comes up against the obstacle of the lack of formal title to the land being lent out under this tenure arrangement.

Giving legal status to derived rights of access to land would also need to describe precisely all the complex arrangements involved (see "A few broad categories" p.9), which is difficult to envisage. Nevertheless, if the state is to play its part in resolving conflicts relating to derived rights, such rights must have some legal basis and be enshrined in the relevant legal texts.

"From a lawyer's point of view, only something which is legally established or founded is valid in law. Derived rights can only have legal validity if the law so provides, or if the law provides procedures for validating acts which fall outside the scope of specifically determined rules and instruments" (A. Roche, pers. comm.).

The way forward therefore would appear to allow local people to negotiate freely their own arrangements in accordance with rules and procedures which they regard as legitimate, and clarify the conditions under which these arrangements can be granted validity in the eyes of the state.

A two part process: combining local recognition of the details of an agreement with acknowledgement of its existence by government

Even oral contracts consist of a number of conditions, or clauses. Some of these are usually a matter of convention while others are more variable and subject to negotiation. The various institutional arrangements found in a given area depend on generally accepted rules and, increasingly, on local validation procedures (witnessed statements, written documents). Respect for these rules and the presence of witnesses to the agreement give the contract its validity as far as local society is concerned. Such validation is necessary if the contract is to be regarded as legitimate by local people and structure of authority. In the main, this is the kind of regulation and security associated with derived rights arrangements.

Nevertheless, in some cases the rules and procedures practised in a given locality are not adequate and people feel the need for recourse to external arbitration. Equally, if the arrangement is between two parties who come from different backgrounds and do not share the same social values, both sides feel the need for some form of external validation by the state. It is only when internal validation is combined with external recognition that effective security of tenure can be achieved.

As noted earlier, it is difficult for the content of these complex and diverse contracts to be legally defined. Legal recognition thus needs to apply not to the actual content of the contract but to the fact that it has been drawn up in agreement with procedures which are officially recognised as valid. Thus, validation by the state does not mean that each contract must take the form of a legal deed, but that people should be allowed to make agreements which will

be recognised by the state, provided that they comply with a certain number of conditions.

Legal recognition of derived rights of access to land does not depend on specifying in advance what the terms of the contract should be. Rather, it depends on recognising the contractual nature of the arrangement concluded between the parties, and in defining the conditions and procedures whereby an agreement of this kind for granting access to land can be recognised as valid by the state.

Local practice and government regulation can thus come together jointly to confirm the validity of derived rights contracts and the means by which they have been agreed. This way of handling rights of access to land also demonstrates how linkages can be drawn between the two systems – local practice and statutory means - thereby clarifying land rights management.

Where recourse to written documents deemed necessary, various options are possible, such as drawing up a written record of the agreement. Of course, the procedures may need to be clarified, but the principle remains that governments should find ways to recognise agreements entered into by local people in accordance with generally accepted rules and procedures.

Formal written contracts are not essential. Provided that the local rules are sufficiently explicit and understood by the local administration, they are then in a position to handle any difficulties which might arise. Putting things in writing is nevertheless useful in certain cases as discussed below.

Derived rights and the economic environment

Arrangements for providing access to land through the delegation of rights of use are, in general, an efficient means of coping with a range of constraints. Thus, any policy aimed at modifying these arrangements needs to work within this broader socio-economic environment. This requires understanding the reasons for people making certain kinds of agreements, such as the scarcity of certain key assets, above all land, labour, and capital.

⁹ Provided for, in law, under the 1906 AOF decree in French speaking parts of West Africa.

Reducing imperfections in agricultural markets

Changes in the marketing opportunities and broader economic context will have an impact on the terms of derivative contracts. Interventions which diminish monopoly power, or reduce barriers to accessing certain inputs will help open up the market and extend the range of choices and margin of negotiation open to less favoured actors. Similarly, an extension of opportunities for activities outside agriculture can change the bargaining power of different groups by offering alternative sources of income to those seeking land to farm.

Facilitating access to credit

Access to credit is an important issue in many farming systems. Resort to *abusan*¹⁰ or *navétanats* systems is a way of getting access to labour in a situation where there is little capital for investment. The pledging and sale of land and even the granting of tenancies are evidence of a need for ready cash, which the land-owner cannot obtain by other means. However, other members of the land-owner's family may find their own access to land is diminished as a result of such arrangements being negotiated, giving rise to tensions and contest within the family.

The present pattern and trends in derivative rights, as well as sales of land reflect an evident need for cash and scarcity of credit for many farmers.¹¹

Improving access to credit through microfinance systems and offering loans for off-farm activity, backed by guarantees other than land, such as social solidarity, are likely to have a significant impact on the land tenure situation and on the risks of impoverishment associated with sales and pledging of land.¹² It will tend to reduce dependence on certain kinds of arrangement, such as mortgage or pledging of land in exchange for a loan.

¹⁰ "Dividing in three". The term *abusan* or *busan* describes various forms of labour contract with a land tenure dimension, based on sharing of the produce or the plantation created. Such contracts have played an important part in plantation dynamics in Ghana and Côte d'Ivoire.

¹¹ It is possible that the availability of credit for growing cotton explains, in part at least, the absence of share-cropping cotton-growing areas.

¹² This link between land tenure and credit has apparently received little attention from researchers, even though the connection between registered land ownership and access to formal credit has been the subject of many studies.

Making derived rights more secure

The approaches proposed in the two previous sections go a long way to resolving many of the problems associated with derived rights. However, in certain areas where some derived rights arrangements are subject to considerable insecurity, or where the land market has developed to a significant degree, the state may need to do more to clarify the rules and procedures.

Reducing legal and institutional insecurity

Legal and institutional uncertainty are two major causes of insecurity in matters of land tenure. They arise from the multiplicity of rules and systems of authority concerned with land issues. It is not only derived rights which are affected by this insecurity, but these secondary, delegated rights are particularly sensitive to it. This insecurity lies at the heart of the land tenure question. Anything which helps to reduce the uncertain status of different laws and institutional structures will therefore help, indirectly, to reduce the insecurity associated with derived rights. This is particularly true of the measures proposed earlier.

The mechanisms of land tenure regulation are also an important issue. At present, the complexity of the land tenure situation is a result of there being several different decision-making bodies which have a *habeas corpus* or *de facto* role in regulating access to land. Nevertheless, the situation is not one of complete confusion, but of “ordered complexity”, or “structural chaos”¹³. Locally, depending on circumstances, people set up procedures for improving the security of their land rights, which can often be relatively stable, and involve both customary structures and local government officials. The best way to reduce institutional insecurity is to make the procedures, rights and obligations better known and more transparent. In particular, it means spelling out the powers of the various parties involved in land tenure regulation, and the procedures to be followed in settling conflicts. This should clarify the need to start in the first instance with local arbitration, the conditions under which an appeal may be made to the government administration, the criteria on which the administration makes its decisions, and so on.

¹³ Richard Moorehead's term to describe overlapping mechanisms for regulating access to high value grazing and irrigated lands in the inner Niger Delta of Mali (Moorehead, 1997).

Spelling out what are legitimate arrangements in a given region

Derived rights arrangements can only be legitimate where they correspond to accepted local practices and therefore are subject to local rules shared by the various parties concerned (those involved in the agreement, witnesses, those responsible for resolving disputes). In many cases, the risk of ambiguity and conflict are low, and there is very little insecurity associated with such secondary rights to land. However, the government administration does need to be aware of the different kinds of arrangement which exist and their key elements, since they may be called upon to pronounce judgement in cases of dispute. In addition, in situations where those involved come from different backgrounds, one cannot assume that there will be a shared understanding of the arrangements in question. They therefore need to be clearly spelled out.

Drawing up an inventory of the recognised arrangements in a given area might be a good way of clarifying the various conditions commonly imposed and ensuring that there is a common point of reference shared by all the actors concerned. Such a procedure would also have the advantage of helping define which authorities (customary, government officials, elected local authorities) are qualified to formalise the terms of an agreement and handle disputes. The process would need to be very decentralised and easy to carry out, concentrating on the main elements of the arrangements in question and subject to a simple form of local validation. Attempts to codify these agreements, even at the local level, face various difficulties, which should not be underestimated: the danger of distorting the content of arrangements because the categories used to analyse them do not fit reality; the risk of trying to turn procedures which are flexible and negotiable into rigid clauses; the problem of defining the geographical scope of the arrangements identified; etc.

A local forum to clarify the rules

One of the challenges to clarifying the land tenure situation is how to gain consensus on the rules or principles to be recognised as legitimate in a given area. To be both legitimate at local level, and legal according to government, these rules must work in the local context and at the same time receive official recognition. Negotiated arrangements are more likely to be established when the parties concerned share a concern for maintaining social stability and peaceful relations. Such negotiations are to be encouraged. It may also help to organise a forum bringing together a number of local personalities and administrative authorities, an example of which is provided by the "land tenure committees" set up by some government officials in Burkina Faso. Active participation in such a forum on the part of the government administration is essential both as a reminder of the broader policy framework within which rights of access to land are negotiated and in order to grant the agreements reached a certain legitimacy.

In some circumstances, it may be useful to stimulate wider public debate on the various arrangements being made, such as in tense situations where there are significant risks of conflict, or where new forms of contract have emerged. This would help clarify the rules and identify potential problems with existing agreements. The local administration is well placed to initiate such activities where it has a mandate to do so and adequate guidelines.

Encouraging people to put things in writing, in a simple form

Most derived rights arrangements take the form of oral agreements, sometimes concluded in front of witnesses. Nevertheless, in Benin, Côte d'Ivoire and Nigeria, as well as Niger, Rwanda and the Comoro Islands, land tenure transactions are increasingly being recorded by farmers in writing as a way of keeping a record of what has been agreed and securing the rights of different interests. Such written arrangements may be drawn up by the parties alone, or following "semi-official" procedures involving the local administration (government officials, or representatives of district assemblies, mayors, etc.) Analysis of these practices reveals that witnesses are always part of the process, with village or administrative authorities sometimes adding their signature to the contract by way of validation. The actual content of these "little bits of paper" is becoming more sophisticated, as the parties become more experienced and the local circumstances change.¹⁴

Most people however are not aware of these new ways of transacting land rights, because they do not constitute formal legal procedures. But they do offer a promising route to achieving greater security of land access by clarifying local rules and legal procedures. While they do not follow formal legal terminology, written contracts of this kind nevertheless come into the category of "private agreements", which have been freely negotiated by the parties. While they are undoubtedly as effective as proof of a transaction than a formal title deed, they are nevertheless a first step towards written proof. Insecurity would be much reduced if such private agreements could be officially recognised as having legal status in land tenure matters, and the various parties with a role to play in land tenure arbitration (courts, local government, customary authorities, etc.) instructed to take them into consideration. Such recognition is likely to provide new impetus to the practice of drawing up written contracts.

¹⁴ Look, for example, at the case studies of Lavigne Delville and Mathieu coord. 1999.

Encouraging people to put things in writing obviously has certain advantages, provided that it is based on existing local procedures. A written agreement has no validity in itself, but substantiates an agreement reached between the persons concerned in front of witnesses and, in some cases, a validating authority. As such, it is one of several ways of contributing to more secure land tenure.

Can written agreements address restrictions on investment by tenants?

In the Sahel, open-ended loans of land usually do not allow the tenant to make any lasting investment. Such conditions are intended to protect the landlord's property rights: the investment of labour on land can provide the basis for claiming rights over the land, so planting trees, or constructing oil and water conservation bunds could entitle the tenant to try and claim the plot as his. One means to avoid the disincentive to invest could be provided by formalising the contract between lender and tenant and making it clear that the tenant waives any claim to the land when the contract expires. It might then be possible to see how the costs of long-term investment and the resulting profits could best be shared between the parties.

Written agreements are most often drafted in the case of sales or pledges of land. They are sometimes used for tenancy agreements, but only rarely in the case of share-cropping arrangements. It would suggest that it is when money is involved that the parties most feel the need to formalise their agreement. Where derived rights are concerned, it is important for government not to regulate written agreements too rigidly by requiring the drafting of a formal legal document, the cost of which would put most people off. Rather, in the process of bringing local practice and national law more closely into line, it is important to be flexible where legal forms are concerned. The main thing is that the principal conditions (time period, restrictions, grounds for termination, etc.) are carefully spelt out, in order to avoid disputes at a later stage. This will be more crucial in the case of land sales, when the procedures need to be more rigorous than in the case of tenancies, when a straightforward private agreement between the parties should suffice. In the former case, attention is needed to gain agreement to the sale from the broader family group, validate the transaction by a recognised authority, keep records, and so on.

Where there is an active market in derived rights and existing arrangements fit into a few simple categories, one option would be for the local administration

¹⁵ It is likely that demand for more rigorous procedures will emerge on their own accord when there is a more obvious need for legal certainty. Offering a range of solutions enables rural dwellers to change and adapt in the way best suited to their particular situation.

to provide a draft document of the main terms to be covered in such agreements, drawn up in both the local and the administrative language (English or French). This might encourage people to opt for written contracts. It is not intended that this act is a rigid blue-print for all contracts but, rather, to ensure consideration is given to key conditions which may subsequently provoke dispute. Such draft contracts would need to leave room for some conditions to be negotiated between the particular parties. Reliance on English or French often means that farmers are unable to check the content of the contract they are signing. They are therefore not sure of their obligations, and may be open to fraud. Where farmers are able to write in their own language or the regional lingua franca (such as Dioula, Moore, Hausa, etc.), they should be encouraged to use this language.¹⁶

Depending on the circumstances, and the level of security required, recourse to the local authorities (mayor, local village official), or even registration and archiving of the contract, might be a useful procedure. It is important to be as pragmatic as possible in laying down requirements to facilitate use of written arrangements. The hope is that, over time, recourse to written agreements, wherever appropriate, will be welcomed and gradually become the norm. But making the procedures too rigid, fixing rules which do not correspond to local practice or obliging people to register land transactions with the government administration in a distant town will discourage such an approach.

Making monetary transactions more secure

The approach described above is now being tried in several countries. In Guinea, the Natural Resource Management Project, with support from the Land Tenure Center, has worked on formalising land transactions. A procedure, based on standardised contracts and validation by District Councils, was proposed and tried out in the late 1990s. In the case of Burkina Faso, the Ministry of Agriculture launched a study in 1999 on making land transactions more secure. Based on case studies carried out in different regions, it came up with a number of proposals for intervention, which were then discussed at local and national level. Following this, a suitable area for testing out these interventions has been identified and preparations made for a pilot project.

¹⁶ In the Comoro Islands, the Cadi draws up a deed in the Comorian language for the parties to the agreement and keeps a French translation in his register; this is translated back to the parties by a third party before they sign the agreement.

These experiments bear witness to a growing interest in this kind of approach in the West African region. The general aim is to promote, encourage and support three inter-linked processes, set within the broader legal and policy framework (Mathieu et al, 2000):

- x the emergence of a socially accepted and locally regulated system for managing monetary transactions of land rights;
- x local debate to identify guidelines as to what are acceptable or unacceptable forms of land transaction;
- x some formalisation of land transactions, at a speed depending on demand, social expectations, and particular local conditions.

But locally negotiated, project-assisted arrangements regarding access to land and natural resources face serious limitations. In the case of specific projects working in this field, local people know they will not last for long, and can only commit themselves in the short term. Even when the agreements reached reflect a firmly grounded negotiation process, recognition of their validity by the administration and technical services depends on the good will of the officials concerned; a change in the local administrator can be enough to render them null and void. In the absence of legal and administrative recognition, local arrangements depend entirely on the willingness of the parties to play by the rules as determined locally; resort to national legislation, by contrast, would throw many such arrangements open to dispute. Though often called on to arbitrate when problems arise, the government administration lacks the guidelines needed to pronounce on the cases presented to them, especially since land legislation is largely silent on the day-to-day problems affecting rural communities. Officials are therefore thrown back on their own initiative and judgement, with only increases in unpredictability of the outcome in the eyes of the local people.

In a number of areas, rights of access to land have become a subject of delicate and difficult negotiation between the parties, and need careful handling by the state. In such cases, it might be helpful for people to have clearer guidelines regarding the conditions and timescales to consider for the agreements in which they are involved. This approach would need the backing of the government, through the expression of a clear, well publicised statement of policy, supported by instruction to the local administration. Only then will activities on the ground be effective in clarifying the rules relating to transactions and establishing tools and procedures to validate contracts.

State interventions to provide greater security for derived rights arrangements could be tried out in certain places where the existence and legitimacy of local procedures for assigning cropping rights has been recognised by the state; where the local administrations have been given explicit authority to accept local procedures as valid; and where a written contract is regarded as an important first step towards legal proof, provided it complies with certain minimal conditions (witnesses, date, signatures, etc.):

- x In the area chosen, the first step to carry out an analysis of derived rights procedures and any existing forms of insecurity. It should then be possible to identify the particular conditions which, in practice, need to be spelt out carefully to reduce the risk of subsequent disputes. Public discussion could then be initiated on these points, with the aim of clarifying and agreeing the procedures, types of arrangement and conditions considered to be legitimate and acceptable to all parties. The government may feel it necessary to lay down certain conditions on the grounds of maintaining social stability or efficiency (e.g. the duration of a tenancy should be equal at least to the cropping cycle concerned – three years for a cotton/cereal/cereal rotation, the withdrawal of a plot loaned on an open-ended basis requires the owner to give at least one season's notice), or indeed make the validation of the contract by the administrative authorities conditional on the inclusion of such terms;
- x depending on the results from this stage, the local administration would then be in a stronger position to issue a local order, or by-law spelling out the procedures and minimal conditions required for recognition of written contracts within their area of jurisdiction.

It would be valuable to set up a simple system for monitoring and evaluation of such a state intervention, analyse the effects of the experiment, adjust the procedure if necessary, and lay down guidelines for encouraging a more widespread use of this approach. At the same time, exchange of experience could be facilitated by learning lessons from experience gained between different areas within the West African region.

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