PEDAGOGIC FACTSHEETS

to gain understanding, ask the right questions, and take action on land tenure issues in West Africa

"Land Tenure and Development" Technical Committee

Myths, deadlocks of land registration and the need for alternative approaches

by Hubert Ouedraogo[1], December 2010

Land tenure securing systems in West Africa are based on the colonial land registration heritage whose failures have often been targeted for criticism. This brief shows that, to be successful, land policies in West Africa must question and even challenge the colonial foundations on which current land legislations rest, including the land registration system.

For an individual, land tenure securing is a prerequisite for the family's livelihood and for ensuring land transfer to heirs. For the state, the process is above all a critical dimension of development policies: increasing agricultural production, controlling urban expansion and ensuring social peace require adequate management of land resources.

But what does land tenure securing mean? Land tenure securing may generally be understood as the process that guarantees land use for a rural producer, i.e. ensuring the latter's free use of the land, while allowing for profits from investments on it, both in terms of work and money.

Land tenure securing materializes through a set of mechanisms, tools and procedures, which vary from one country to the other. Far from being static, the latter also evolves over time. Eventually, beyond the usual question "how to secure?" it is crucial to dare ask oneself "who do we want to secure?"

The history of land tenure in West Africa shows that, to achieve land tenure securing, the colonial administration promptly opted for the land registration system. Land tenure securing was then equated to private ownership of land and the registration was supposed to help generalize it. Even today, land registration is the foundation of land legislations in most countries of the region.

Land registration: The favourite instrument of the colonial land reclamation policy

Colonial land issues

The land registration system can only be understood as a setback in the context of the "land reclamation" policy of the colonial administration. The "reclamation" of colonial lands required the coordinated intervention of both the colonial administration and colonial companies. The land tenure issue soon became a major constraint. Indeed, how could colonial companies be provided with adequate land security that would allow them take full advantage of investments?

The solutions discussed

>> Total rejection of customary land rights. The legal experts of the colonial administration quickly dismissed the idea of building on customary land

[1] *Hubert M. G. Ouedraogo, Legal Expert and Anthropologist: hodrago@yahoo.fr*

Production coordinated by:

entitlements to secure investments in colonies. The reasons ranged from difficulties with comprehension and interpretation of the numerous and variable customary land tenure systems to the reliance on oral tradition that offers neither clarity as to the applicable rule nor evidence concerning land transactions. Furthermore, customary systems do not provide for private property. Customary land entitlements are collective in nature and therefore difficult to negotiate. Thus, because they are inalienable the free "transfer" of land from an individual to the other is hampered…

>> Reservations about the enforcement of the Civil Code. One could believe that, as it rejected local customs, the colonial administration would simply apply the system in force in Europe. In France, for instance, land issues are governed by the Civil Code, a set of laws that regulates private right issues. The French 1804 Civil Code was enforced in French West African colonies, especially in the colony of Senegal (1830). But, its provisions relating to land tenure were not applied. Simply, they were deemed inappropriate for the colonial context (poor dissemination of written materials; embryonic state of the land administration; lack of lawyers…).

Moreover, technically, it was quite improbable, under the Civil Code, to move land from its original customary status to the civilian status of private property.

The pro-land registration system option

It was the Torrens Act that generated the land tenure securing model in response to the ambitious program aimed at introducing and generalizing landownership in the colonies. The Torrens Act (1858) instituted in Australia a system of "administrative creation" of private landownership by repealing customary land entitlements on the one hand and by created a real land "registry service" through "land books". After a complex procedure of physical (delimitation and boundary marking) and legal (allocation of a single number to each landowner) individualization of land, the applicant was granted a land title by the government, conferring him/her with a property right.

Later, the Torrens Act system — called land registration system — was adapted to the conditions in French colonies. In West Africa, the system was instituted in 1900, fine-tuned in 1906 and revised by decree in 1932. As they achieved independence, all African countries nationalized the 1932 decree, adapting it to their respective situations through various national acts.

The land registration procedure typically comprises the following 5 key steps:

- application for registry;
- publication of the application and collection of possible claims;
- land delimitation and boundary marking;
- settlement of possible claims;
- the registration itself.

Each step involves a set of documents to be provided, procedures to go through and costs incurred by the applicant.

The choice of this system made by colonial administrations and then by post-independence African governments rests on a number of myths related to its presumed effects. First, land registration is considered as the only source of any land entitlement and, therefore, land acquired through customary law can achieve the status of property only through this procedure. Secondly, land titles are deemed intangible: i.e. final and unquestionable. Any action meant to challenge a land title is not receivable by justice. In due course, we will see that the system did not achieve its expected results.

Benin © Aurore Mansion

Land registration in real contexts

Acknowledgement of failure

The objective was to introduce and progressively generalize private land

Madagascar © André Teyssier

ownership in colonial territories, in lieu of the customary land tenure system. But, a century later, experts are unanimous on the fact that this choice can be considered as a failure.

Less than 5% of lands are reported as registered in Sub-Saharan Africa, including state-owned properties. The overwhelming majority of rural lands are still managed de facto by traditional institutions (land managers, lineage heads, etc.). As far as the unquestionable nature of the entitlement is concerned, bad governance in the area of land tenure easily reduces it to a mere theoretical principle. Similarly, poor land record keeping results in the partial or total destruction or disappearance of the land registers on which the system relies.

Finally, the recently adopted national legislation in some countries (e.g. Benin) openly objects to the unquestionable nature of land entitlement, referring to the general principles of law.

● The causes of failure

Many reasons account for the failure of the land registration system. In the main, they have to do with the very logic of the system, the institutional framework and, eventually justice and equity.

>> From the perspective of the system's logic. In logic of conquest, the colonial administration had to disregard the validity of indigenous land rights. It attempted to replace the latter, which was of collective nature, by private property, forgetting that property can never be reduced to the succinct phrasing of Article 544 of the Civil Code: "Property is the right to enjoy and dispose of things in the most absolute manner, provided that it does not serve for a use prohibited by law or regulations."

In Europe as well, property has undergone many developments since antiquity.

>> From an institutional perspective. The land registration procedure is particularly complex, long and costly. It was thus inevitably inaccessible for an overwhelmingly poor and illiterate rural population, which, besides, lived physically very far from the offices of land administration. All these elements show that the system was not designed to reassure rural African populations, but rather for the benefit of colonial companies and the African elite.

From the beginning, the land registration system had little chance to be scaled up to the whole population. Its generalization would have required the establishment of a very large scale land administration. The optional nature of the procedure undoubtedly relegated this system to the edges of the reality of land management in the field.

>> From the justice and equity perspective. The introduction of the land registration system generated the situation of "legal duality" in the area of land tenure (coexistence of the registration system and customary systems). This dualism conceals a questionable grading of land titles: registered titles for colonial companies and the local elite and non-government-secured customary titles for indigenous African populations.

Need for alternative land tenure securing approachese

Future land policy reforms in Africa should consider land tenure securing differently. In particular, a departure from colonial presuppositions about security of land tenure and customary land titles is pertinent.

While the land registration system can be appropriate for major estates benefiting from heavy investments, the history of land registration points to the

need to design alternative approaches for small family farms, building on the consensus around the validity of indigenous land rights in their wide diversity. Several options can be explored.

● **The first option is a methodological one.** Despite their assumed limitations, participatory approaches should underpin land policy and legislation development processes. Participation and well-conducted consultations are good means for reducing the risks of adopting inadequate and non-applicable land system options.

Recent experiences (Burkina Faso) confirm the advantages of initiating a land policy reform, beginning with the development of a land policy paper, rather than a legislative act. Treating land reforms as policy issues to be subjected to public scrutiny and a wider debate helps focus discussions on a clear draft policy paper. Additionally, if too much sophisticated legal language is avoided, the actual and essential participation of all actors in the debate is clearly facilitated.

FOR FURTHER INFORMATION

>> BOUDERBALA N., *Une sécurisation toute relative*, Colloque sur les frontières de la question foncière ; enchâssement des droits et politiques publiques (2006). *www.mpl.ird.fr/colloque_foncier/.../PDF/Bouderbala.pdf*

>> COMBY J., *Sécuriser la propriété sans cadastre*, mai 2007. *www.adef.org/RESSOURCES/propriete_sans_cadastre.pdf*

>> OUEDRAOGO H. M. G. , "Réformes agrofoncières et développement en Afrique", *Revue burkinabé de droit*, N° 15 spécial, janvier 1989, p. 89-106.

● **A second option consists in recognizing legitimate land rights**, with their specificities, which deserve equal consideration and legal protection. It is such an option that is suggested by the Nigerien law where it is stipulated that "land rights are conferred by custom or written materials.".

● **A third option relates to land management institutions and tools.** Relying on existing local institutions or working towards their improvement is a promising guarantee for the effectiveness of local land management, provided that the capacities of these institutions are developed, and that local governance issues are addressed. As for land tenure securing tools, field experiences show that it is preferable for them to be adjusted to local institutions' capacity to use them, beyond too strong a dependence on foreign assistance.

From this perspective, the land certification (Madagascar, Ethiopia, etc.) or land transaction securing approaches are experiences from which we can draw valuable lessons for the future. ●

These pedagogic factsheets were produced with the support of the Technical Committee on "Land Tenure & Development" and the "Land Tenure Policy Elaboration Support" mobilizing project financed by the Agence Française de Développement. These factsheets can be downloaded in their entirety from the www.foncier-developpement.org web portal.

afd AGENCE FRANÇAISE DE DÉVELOPPEMENT

Liberté • Égalité • Fraternité RÉPUBLIQUE FRANÇAISE MINISTÈRE DES AFFAIRES ÉTRANGÈRES ET EUROPÉENNES

Technical Committee LandTenure&Development