

Changes in “customary” land tenure systems in Africa



Edited by Lorenzo Cotula



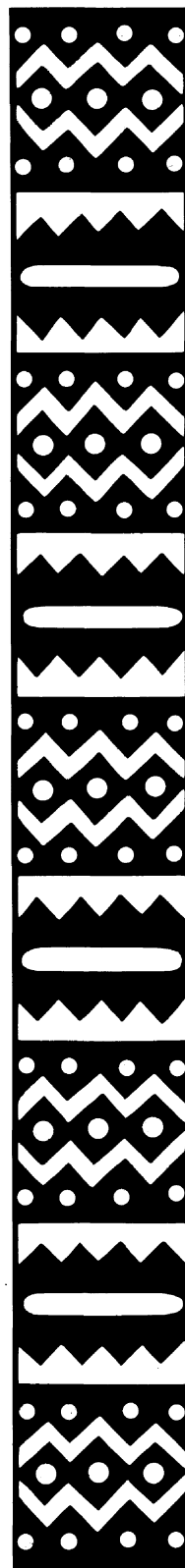
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Edited by Lorenzo Cotula

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Jean-Pierre Chauveau, Salmana Cissé,
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CHANGES IN “CUSTOMARY” LAND TENURE SYSTEMS IN AFRICA

Lorenzo Cotula

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ABBREVIATIONS

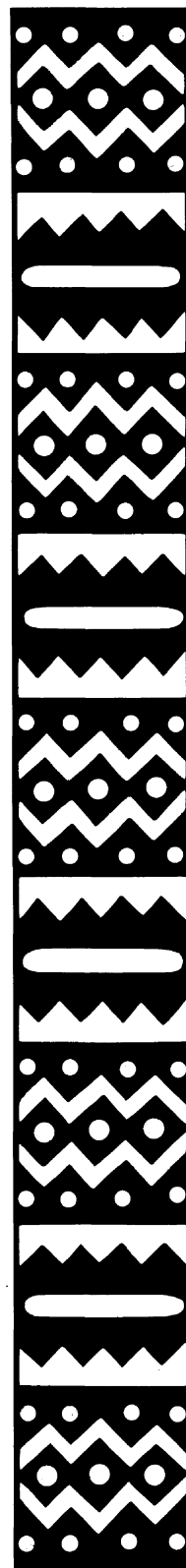
CLAIMS	Changes in Land Access, Institutions and Markets in West Africa
FAO	Food and Agriculture Organization of the United Nations
GIDIS	Groupement Interdisciplinaire de Recherche en Sciences Sociales
GRAD	Groupe de Recherche Actions pour le Développement
GRET	Groupe de Recherche et d'Echanges Technologiques
IER	Institut d'Economie Rurale
IIED	International Institute for Environment and Development
IRD	Institut de Recherche pour le Développement
ISSP	Institut Supérieur des Sciences de la Population (Université de Ouagadougou)
LAJP	Laboratoire d'Anthropologie Juridique de Paris
LARES	Laboratoire d'Analyse Régionale et d'Expertise Sociale
DFID	Department for International Development, UK
NGO	Non-governmental organisation
NORAD	Norwegian Agency for Development Cooperation
UCL	Université Catholique de Louvain
UERD	Unité d'Enseignement et de Recherche en Démographie (Université de Ouagadougou)
UMB	Université Mande Bukari, Mali

“It is important to note that indigenous law is not a fixed body of formally classified and easily ascertainable rules. By its very nature it evolves as the people who live by its norms change their patterns of life.”
Constitutional Court of South Africa, *Alexor Ltd v. The Richtersveld Community*, 14 October 2003, CCT 19/03.

“Everything must change if we want things to stay the same.”
19th century Sicilian noble, explaining why he supported the unification of Italy against his sovereign, the King of the Two Sicilies.
Tomasi di Lampedusa, *Il Gattopardo*.

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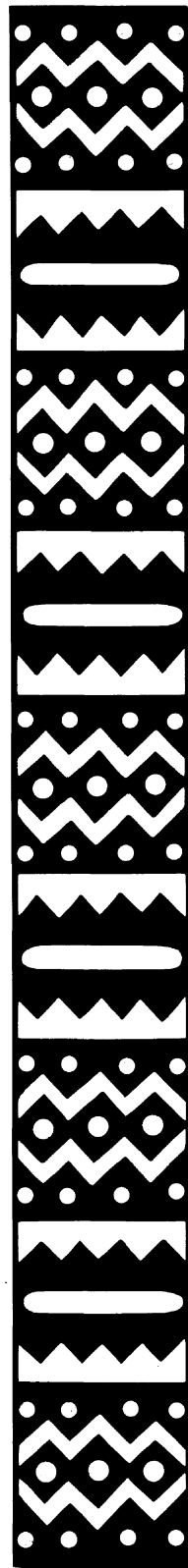
EXECUTIVE SUMMARY

Across rural Africa, land legislation struggles to be properly implemented, and most resource users gain access to land on the basis of local land tenure systems. These usually involve diverse combinations of “statutory” and “customary” entitlements, and multiple and overlapping rights over the same resource. In recent years, earlier emphasis on replacing “customary” with “modern” tenure systems has given way to a recognition that land policies and laws must build on local practice. Several African countries have recently adopted legislation that provides (some degree of) protection for local land rights. This shift in policy thinking raises the need better to understand what is happening to land tenure systems on the ground.

“CUSTOMARY” LAND TENURE SYSTEMS ARE CHANGING...

In recent decades, major changes have taken place in African economies and societies, including demographic growth, urbanisation, monetarisation of the economy, livelihood diversification, greater integration in the global economy, and cultural change. These processes have had major implications for local land tenure systems. Although such systems claim to draw their legitimacy from “tradition” and are commonly referred to as “customary”, they have been profoundly changed by decades of colonial and post-independence government interference, and are continually adapted and reinterpreted as a result of social, economic, political and cultural change.

The ways in which customary systems respond to such change vary substantially, based on the extreme diversity of local contexts.



While in some cases customary authorities have managed to maintain or even strengthen their power (including through strategic alliances with central government authorities and business elites, capture of local government bodies, and control over land and related revenues), in others they have been eroded by change in the demographic composition of the local population, by competition from central and local government institutions, and by changing balances of power in local economic relations (e.g. with access to financial resources acquiring growing importance vis-à-vis traditional aristocracy as a source of economic power). In yet other cases, while customary authorities are still effective in regulating land access, the collegiate bodies that used to oversee their work are not; the result is a breakdown in accountability and a privatisation of common lands.

Similarly, while extended family groups continue to play an important role as land management units in many parts of rural Africa, demographic change, urbanisation, commercialisation of land relations and other factors are pushing towards land management decisions being taken more and more at a household or even individual level. In these contexts, land scarcity may lead to a redefinition of the land claims of different groups within the extended family (for instance, along gender lines), with weaker groups becoming more vulnerable to losing their land access. It may also foster tensions between older generations traditionally controlling land access and younger generations left with more limited land access opportunities.

In high-value land areas, monetarised land transactions are mushrooming. This includes the monetarisation of customary forms of land transfers, such as the “tutorat” arrangement between autochthons and incomers in West Africa; and the emergence of new types of land transactions such as “sales”. These changes bring about new practices such as use of witnesses and of written contracts. The arrangements produced by these changes (whether forms of néo-tutorat or market transactions) remain deeply embedded in complex social and political relations.

These changes in customary tenure system seemed to confirm the basic tenets of the so-called “evolutionary theory of land rights” - whereby demographic growth and agricultural intensification tend to push towards greater individualisation and commercialisation of land rights. However, empirical evidence from many parts of Africa shows that the picture is often more complex than the linear process described by this theory. For instance, intra-family individualisation processes may co-exist with the continuation or reinterpretation of the collective dimensions of customary land tenure, in order to reaffirm the primacy of the land rights of locals vis-à-vis groups outside the extended family.

... WITH IMPORTANT LIVELIHOODS IMPLICATIONS...

These profound changes in land relations have important implications for the livelihoods of resource users. In much of rural Africa, land is of crucial importance to economies and societies, constituting the main livelihood basis for a large portion of the population. In most African countries, agriculture is a main economic activity, and access to land is a fundamental means whereby the poor can ensure household food supplies and generate income.

In this context, changes in land tenure systems bring about winners and losers. As land competition increases and as resource access relations become more monetarised, those with more access to financial resources (including local elites and urban middle classes) are able to gain control over valuable resources. And, in many parts of Africa, assertive customary chiefs are reinterpreting their guardianship powers as those of owners, and are allocating or even selling common lands for private gain. In this context, weaker rural groups are being squeezed out, and are losing access to the resources on which they depend for their survival.

... WHICH CALL FOR TAILORED GOVERNMENT ACTION THAT BUILDS ON LOCAL PRACTICE

This calls for effective government action. Where customary systems have been eroded by social, economic, cultural and political change, government intervention may be needed to provide effective land management. Even where customary systems seem to work well at the local level, government intervention may be required as powerful outsiders that do not feel bound by those systems (e.g. urban elites, foreign investors) enter the land arena. In these cases, lack of legal protection for local land rights based on customary systems may result in local resource users losing land access. And, whether customary systems are still working well or not, government intervention may be needed to secure the resource claims of weaker and more vulnerable groups – who stand to lose out in ongoing processes of change in local land relations.

Recent emphasis on the need for legislation to build on local practice is a major step forward compared to the past. Ongoing debates on the formalisation of land rights (which tend to be centred on individual land registration programmes) must avoid the trap of appealing but simplistic one-size-fits-all solutions. Where resource access rights are multiple and overlapping, as is the case in much of rural Africa,

registering individual property rights would raise important technical and political challenges, and would entail that unregistered right holders lose access to vital resources. Therefore, legislation that aims to secure resource claims based on locally recognized tenure systems, rather than to overhaul them, is in many cases the most effective way to secure access to natural resources.

In this, temptations to idealise the “local” must be resisted. Many customary systems are inequitable as regards social status, age, gender and other aspects. And, in the process of change affecting customary tenure systems in many parts of Africa, local elites steer that change and make the most of it, while weaker groups are losing out. This raises the challenge of finding ways to “square the circle” of recognizing and securing local land rights, which are the entitlements through which most rural people gain access to land; while avoiding entrenching inequitable power relations and unaccountable local institutions.

Given the great diversity of local contexts, there is no blueprint solution to secure evolving land rights in Africa. Rather, emphasis must on the process to design and implement context-specific solutions. This raises the need to properly understand the changing dynamics of customary land tenure in each specific context; to fully take account of these dynamics, and of the diversity and often overlapping nature of land rights, in devising tailored policy interventions; to tackle power imbalances at the national as well as at the local level; and to establish processes for accountability and transparency in both policy design and implementation.

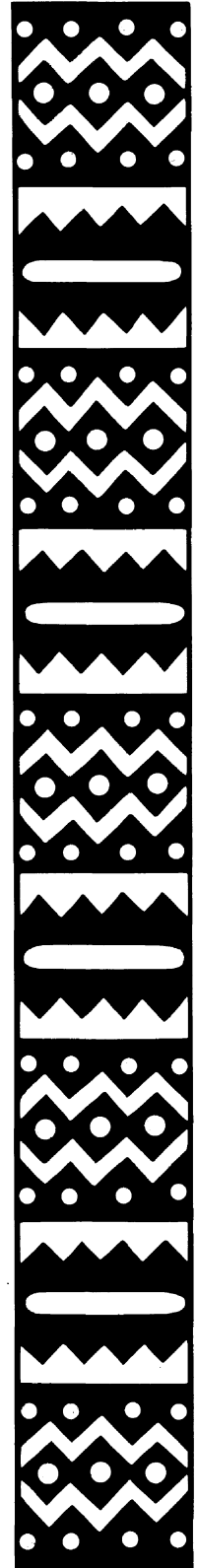
1. INTRODUCTION

Lorenzo Cotula

1.1. BACKGROUND

Across rural Africa, land legislation struggles to be properly implemented, and most resource users gain access to land on the basis of local land tenure systems. Although such systems claim to draw their legitimacy from “tradition” and are commonly referred to as “customary” (and for easier reading we will follow this terminology), they have been profoundly changed by decades of colonial and post-independence government interventions, and are continually adapted and reinterpreted as a result of diverse factors like cultural interactions, population pressures, socio-economic change and political processes. Such land tenure systems are extremely diverse, possibly changing from village to village. This diversity is the result of a range of cultural, ecological, social, economic and political factors.

For decades, many African governments have sought to replace customary land tenure systems with a “modern” system of property rights, based on state legislation, on European concepts of ownership and on land titling and registration. This is partly because, since colonial times, customary land tenure was held not to provide adequate tenure security, thereby discouraging investment and negatively affecting agricultural productivity (Swynnerton, 1954; Wilson, 1971). In order to address these issues, African states took on a key role in regulating land relations – either directly, through land nationalisation, or through registration programmes aimed at creating private ownership rights. This central role of the state in land relations was to



promote agricultural development on the one hand, and to control a valuable asset and a source of political power on the other. However, in much of rural Africa, lack of financial resources and of institutional capacity in government agencies, lack of legal awareness and, often, lack of perceived legitimacy of official rules and institutions have all contributed to limit the outreach of state interventions. Where land registration has been pursued, this has proved slow, expensive, difficult to keep up-to-date and hard for poor people to access. As a result, very little rural land has been registered (across the continent formal tenure covers only between 2 and 10 percent of the land; Deininger, 2003), and customary land tenure systems continue to be applied in much of rural Africa.

In addition, the claims on the inherent insecurity of customary land tenure have been challenged by research that has demonstrated the resilience of these systems and their capacity to adapt to changing circumstances. While earlier approaches emphasised continuity of “tradition”, more recent studies have emphasised change and reinterpretation (Cousins and Claasens, 2006). For instance, a large body of research from many parts of West Africa has documented the emergence of land rentals and sales within local tenure systems – practices that were previously considered to be incompatible with customary tenure (Lavigne Delville *et al.*, 2001; Mathieu *et al.*, 2003). Recent research has also shown that local land systems effectively enforcing land rights can provide adequate tenure security and related investment incentives (Sjaastad and Bromley, 1997). At the same time, important equity concerns have been raised in relation to many customary systems, particularly with regards to gender and the protection of the land rights of more marginalised groups. Far from being the idealised, “community-based” systems described by some, customary land tenure regimes (and elite manipulation thereof) provide the backdrop for processes of exploitation and social exclusion. While the central role played by negotiation in those systems enables flexibility and adaptability, it can also lead to the marginalisation of those with weaker bargaining power (Peters, 2004). And, while the position of women under customary tenure varies considerably, many such systems contain norms and practices that are gender discriminatory (Whitehead and Tsikata, 2003).

As a result of the failure of early attempts to replace customary systems with modern systems of land tenure, and of the recent, more nuanced perception of customary systems, a shift in thinking has taken place. It is now generally recognized that land policies and laws must build on local concepts and practice, rather than importing one-size-fits-all models. This entails, among other things, legally recognizing local land rights, which are the entitlements through which most people gain access to rural land. In its latest Policy Research Report on land tenure, for instance, the World Bank argued that “in customary systems, legal recognition of existing rights and institutions, subject to

minimum conditions, is generally more effective than premature attempts at establishing formalised structures” (Deininger, 2003:xxvii).

As a result of this shift in thinking, recent land policies and laws present important innovations compared to their predecessors. Some African countries have made explicit efforts to capture all land rights in records, even where land remains state-owned or vested with the state in trust for the nation. This includes protecting customary land rights and providing for their registration. In Uganda, while the Land Reform Decree of 1975 made customary landholders tenants at will of the state (McAuslan, 2000), the 1995 Constitution and the 1998 Land Act, as amended, protect customary land rights. Customary rights are also protected for instance under Mozambique’s Land Act 1997, Tanzania’s Land Act and Village Land Act 1999, Niger’s Rural Code 1993 and Namibia’s Communal Land Reform Act 2002. In Niger, the Rural Code specifically recognises customary rights as a legitimate source of land claims. Mozambique’s Land Act 1997 reaffirms the principle of state ownership over land but protects “rights of use and benefit”, which are acquired either on the basis of “customary law” or through good-faith occupation for at least ten years. In Mali, while post-independence legislation abrogated customary rights, the Land Codes (*Codes Domaniale et Foncier*) of 1986 and 2000 (as amended in 2002) legally recognise customary land rights and grant them (some degree of) legal protection.

This shift in thinking on land tenure security has raised new questions and challenges. For instance, if local land rights are to be recognized, how to go about it in practice? Customary systems are often complex, with overlapping rights over the same resource held by different users (e.g. herders and farmers, men and women, parents and children). Also, some have argued that formalization risks resulting in codification and hence in loss of flexibility, which is one of the very strengths of customary systems. In addition, some groups may be discriminated against under customary systems (typically women), and formalizing customary rights may favour some groups and disadvantage others (e.g. migrants vs. autochthones). This creates the challenge of devising mechanisms to recognise local land rights without entrenching discriminatory institutions and practices.

Above all, such shift in thinking raises the need to ascertain what is happening to local land tenure systems on the ground. In recent decades, important changes in African economies and societies have taken place, including demographic growth, urbanisation, monetarisation of the economy, livelihood diversification, greater integration in the global economy, and cultural change. These factors are likely to have affected, and to continue to affect customary land tenure systems. Reports from across the continent have suggested that processes of individualisation and commercialisation of land relations are taking place. Customary systems have also been affected by decades of government policies and

programmes in the land sector. While these interventions may often not achieve their original aims, they do generate intended and unintended consequences, including possibly undermining the effectiveness and/or perceived legitimacy of customary systems.

1.2. OBJECT, SCOPE AND METHODOLOGY

This study seeks to respond to this challenge. It explores changes in customary land tenure systems in Africa, identifying the factors driving such changes and analysing their livelihood implications. Given the very nature of customary law, this is a daunting task. On the one hand, as already mentioned, customary systems vary substantially from context to context – and the African continent presents a great diversity of ecological and socio-economic contexts. On the other, customary land tenure systems cover a very broad range of issues – from farming to grazing lands, from gender issues to inheritance to land transactions. No single study can adequately capture the wealth and complexity of these issues across the continent. This study does not purport to exhaustively document ongoing change in the various aspects of customary land tenure systems across Africa. Rather, drawing on only a partial picture, it raises issues and identifies key trends across the continent, but with an emphasis on West Africa.¹

The central topic of this study – changes in local systems of rules and institutions for the management of land rights – is at the very heart of legal anthropology, but also raises broader issues concerning the linkages between change in local rules and institutions and change in the wider economy and society. We will tackle this topic through an interdisciplinary approach that brings together insights from anthropology, sociology, economics, law and geography. The study adopts a three-pronged methodology, which is reflected in the structure of this report. It includes:

1. The analysis of the key factors that are driving change in land relations in the continent, exploring how these may affect, or are affecting customary land tenure (chapter 2);
2. The study of three “strategic” aspects of customary land tenure: changes in land relations within the family, including gender and age relations; changes in land management institutions; and changes in mechanisms for land transfers, both between groups and between individuals (chapters 3 to 5);
3. A case study from the Inner Niger Delta (Mali), to analyse the “strategic” themes identified under 2 above more in detail and within the specific context of the case study area (chapter 6).

1. Northern Africa is not covered by this study.

The conclusion summarises key findings and explores the implications of these changes for local livelihoods.

The study draws on three main sources. First and foremost, it builds on research findings from a range of IIED-coordinated projects on changes in customary law and in land relations in different parts of Africa. These projects have produced a wealth of materials and of empirical evidence, which this study draws on (for more information on some of these projects, see Box 1.1). As several of these projects focused on West Africa, this study is “richer” in evidence from this region. However, efforts have been made to mobilise complementary materials from other parts of Africa. The second main source for this study is therefore a review of the available literature, which enabled us to complement our materials on West Africa, and to obtain insights on other regions.

In addition, the study offered the opportunity for new fieldwork, which fed into the case study presented in chapter 6. Fieldwork built on earlier work undertaken within the context of both the “Pastoral Land Tenure and Decentralisation” project and the study on the interface between land and water rights (see Box 1.1). The new fieldwork enabled us to update and expand our data. Fieldwork followed a qualitative methodology and

BOX 1.1. RESEARCH PROJECTS ON CHANGES IN LAND RELATIONS IN AFRICA

- “Changes in Land Access, Institutions and Markets in West Africa” (CLAIMS, 2002-2005) – a four-year research project funded by the European Union, coordinated by IIED and implemented by eight African and European partners (GRET and IRD, based in France; UCL, based in Belgium; UMB in Mali; GIDIS in Ivory Coast; LARES in Benin; and UERD, now ISSP, in Burkina Faso). CLAIMS entailed fieldwork in several sites from four West African countries: Benin, Burkina Faso, Ivory Coast and Mali (for a synthesis of the key research findings of the CLAIMS project, see Chauveau *et al.*, 2006).
- “Can Land Registration Work for the Poor?” (2002-2005) – a four-year research project on efforts to document land rights in Ghana, Ethiopia and Mozambique. The project was funded by DFID, coordinated by IIED and implemented by the Institute of African Studies at the University of Ghana, the Land Studies Unit at Eduardo Mondlane University in Mozambique, and Mekelle University and SOS Sahel in Ethiopia (for a synthesis of the key research findings of this research project, see Kanji *et al.*, 2005).
- “Pastoral Land Tenure and Decentralisation in Mali” (1999-2003), funded by NORAD and implemented by IIED and by a Malian NGO, GRAD. The project entailed action-research with local governments and customary institutions in the Inner Niger Delta, Mali.
- Several studies funded by FAO, including a study to identify current and emerging issues relating to land tenure in Africa (Cotula *et al.*, 2004); a study on the linkages between international remittances and land rights in West Africa (Cotula and Toulmin (eds), 2004); and a study on the interface between land and water rights in the Sahel (Cotula (ed), 2006).

entailed in-depth, semi-structured interviews with a range of local stakeholders (see chapter 6 for further detail on fieldwork methodology).

1.3. WHAT IS “CUSTOMARY” LAND TENURE?

Before starting our analysis it may be useful to recall some general characteristics of “customary” land tenure systems in Africa.

Customary “law” is a body of (usually unwritten) rules founding its legitimacy in “tradition”, i.e. in its claim to have been applied for time immemorial.² The content of customary law is extremely diverse, possibly changing from village to village. The degree of its internal consistency also varies, ranging from (rare) systematised codes (Bennett, 1985, on the Merina of Madagascar) to, more often, “loosely ordered...repertoire[s] of norms” (Comaroff and Roberts, 1981:70, writing on the Tswana of Botswana). This diversity is the result of a range of cultural, ecological, social, economic and political factors. Because of this great diversity, generalisations should be avoided. Also, customary rules are not static, but continually evolving as a result of diverse factors like cultural interactions, population pressures, socio-economic change and political processes. According to the so-called “evolutionary theory of property rights”, for instance, population pressures and increased land scarcity tend to push towards a transition from communal to more individualised rights (see below; Boserup, 1965; for a critique, see Platteau, 2000, and Chauveau *et al.*, 2006). And, in much of the Sahel, customary resource tenure systems have been influenced by Islamic law. Colonialism also had a major impact on many customary resource tenure systems across Africa, as local groups and individuals as well as the colonial administration manipulated customary law for their own ends, and as colonial courts responsible for applying “native” law distorted it by filtering its norms through European legal concepts (David and Brierley, 1985; Chanock, 1985; Allott, 1984; Berry, 1993; Mamdani, 1996). And, in the processes of social and economic transformation that are underway in many parts of Africa, “custom” is being reinterpreted and “reinvented” (Ranger, 1983), with different actors using different interpretations of different bits of customary law to support their competing claims. While customary law regulates a wide range of issues (e.g. family relations, property law), the focus here is on resource tenure systems – the bodies of rules and institutions governing the way land and natural resources are held, managed, used and transacted (Adams *et al.*,

2. On customary law in Africa, see for instance Comaroff and Roberts, 1981; Chanock, 1985 and 1991; MacCormack, 1993; Allott, 1984; Gluckman, 1969; David and Brierley, 1985; Menski, 2006. On customary land tenure systems in Africa, see Bruce, 2000; Ng’ong’ole, 1996; Lavigne Delville *et al.*, 1998; Chauveau, 1998; Lund, 2000; Mathieu *et al.*, 2000; Thébaud, 2002; Toulmin *et al.*, 2002.

1999; Cotula, 2006). Tenure systems regulate the “bundle of rights” existing over each piece of land, including “operational” rights (right to access land, to cultivate it, to withdraw produce, etc.) and management rights (e.g. the right to allocate and transfer land; Schlager and Ostrom, 1992).

According to the dominant if somewhat stereotyped view of customary resource tenure systems in Africa, land is usually held by clans or families on the basis of diverse blends of group to individual rights, accessed on the basis of group membership and social status, and used through complex systems of multiple rights. In reality, customary resource tenure systems vary considerably depending on the context. Important differences exist, for instance, between pastoral and farming contexts. The former tend to emphasise collective rights based on negotiated, flexible and reciprocal arrangements that enable herd mobility (see for instance, on the Sahel, Thébaud, 2002). The latter also usually entail collective rights, but typically involve the allocation of farming rights over specific plots by the land management authority (e.g. the “chief”) to smaller family units. The nature of these smaller units and of the farming rights they hold vary considerably from place to place. In many cases, farming rights are conditional upon the continued use of the plot. And, while such rights are often inheritable, restrictions usually exist on sales (especially to outsiders), although certain transactions may be allowed (gifts, loans, etc.) and some systems do allow land sales.

In addition, considerable differences exist between patrilineal and (in Africa more rare) matrilineal systems. Broadly speaking, under patrilineal succession systems property devolves through the male line (from father to son), and wives and daughters usually have no inheritance rights. Under matrilineal systems, property is traced through the mother’s line but generally owned and controlled by men (i.e., sons inherit land from their mother’s male relatives); however, women tend to have greater rights than under patrilineal systems, for instance enjoying stronger cultivation rights and being able to obtain gifts from their fathers (Lastarria-Cornhiel, 1997).

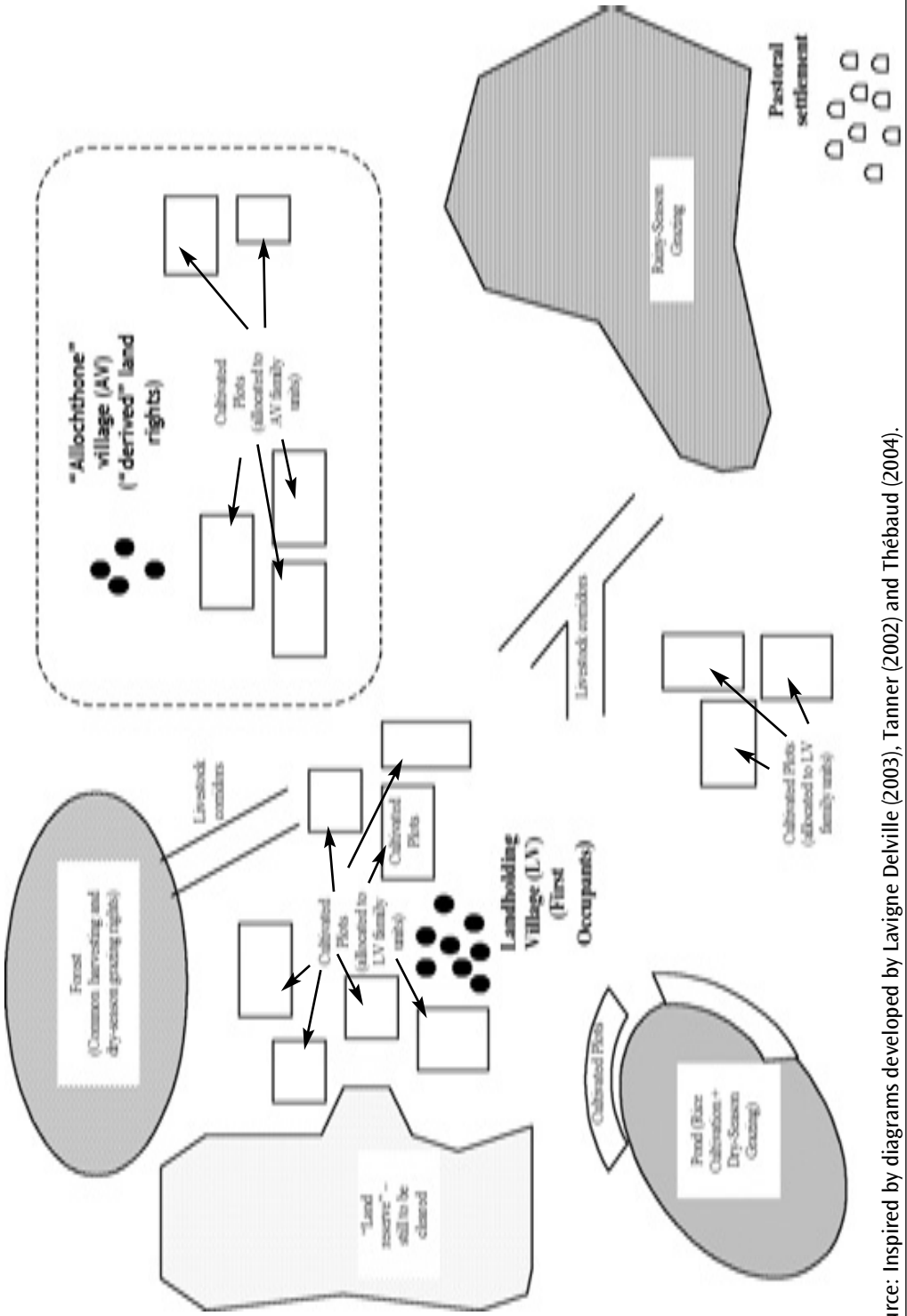
For a given piece of land, customary systems may cater for multiple resource uses (e.g. pastoralism, farming, fishing) and users (farmers, residents and non-resident herders, agro-pastoralists; women and men; migrants and autochthones; etc), which may succeed one another over different seasons. A wealth of institutional arrangements regulate relations between those who first cleared the land (“autochthons”) and those who currently use it on the basis of an agreement with the autochthons (“allochthons”, “incomers” or “migrants”; Chauveau, 1998). For an attempt to visualise these multiple and overlapping resource rights and uses, see Figure 1.1, which draws on evidence from the Sahel.



Overlapping resource rights under customary tenure systems: grazing rights on harvested millet fields, Mali. Credit: Lorenzo Cotula, 2006

As a result of the lack of implementation of state legislation and of the continued application of customary law, several legal systems – statutory, customary and a range of “in-betweens” (Cousins and Hornby, 2006; Mathieu, 2004) – regulate resource rights in the same territory, resulting in overlapping rights, contradictory rules and competing authorities (“legal pluralism”, see e.g. Griffiths, 1986). The neat distinction between “customary” and “statutory” land tenure systems is considerably blurred, and easy dichotomies between the two must be avoided. “Customary” systems have been much changed by a century or more of interpretation by courts and interference by governments, both colonial and since independence. Equally, statutory systems for land management usually operate with considerable possibilities for negotiation, and it is not uncommon for government officials to follow customary law principles to settle natural resource disputes on the basis of mediation and conciliation. Between the ideal-type

FIGURE 1.1. AGRO-PASTORAL SYSTEMS IN THE SAHEL



Source: Inspired by diagrams developed by Lavigne Delville (2003), Tanner (2002) and Thébaud (2004).

“customary” and the ideal-type “statutory”, a great deal of hybrids and “in-betweens” (Cousins and Hornby, 2006; Mathieu, 2004) exist. Farmers may have registered their land, thereby converting their customary rights into freehold; but not updated the register following succession or sales, so that existing rights are unregistered, with land tenure reverting back to “customary” practices (e.g. on Kenya, Coldham, 1978; on South Africa, Cousins and Hornby, 2006). In Mali, fieldwork undertaken for this study found statutory institutions such as rural communes using arguments based on “customary” law to back up their natural resource management claims, which are asserted in legislation that has been adopted but that is not yet operational (see chapter 6). In many disputes over land rights, parties selectively refer to bits of both customary and statutory law, choosing those norms and dispute settlement institutions that better support their claims (“forum shopping”). In other words, resource users gain access to natural resources through a blend of “customary” and “statutory” arrangements. Rather than a dichotomy between opposing extremes, local reality usually resembles more a continuum of different combinations of both (Benjaminsen and Lund, 2003).

2. THE DRIVERS OF CHANGE

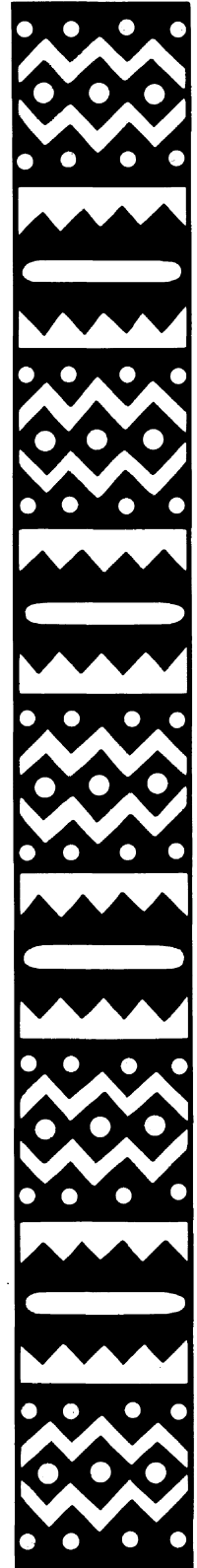
Lorenzo Cotula with Bernardete Neves³

2.1. SETTING THE SCENE

The African continent is experiencing major processes of social transformation. Population pressure is increasing in many parts of Africa, and competition over land is rising as a result. Urban settlements are growing fast, encroaching on agricultural land and attracting youths from rural areas. In many places, livelihoods are changing, including towards greater diversification – with many rural households increasingly relying on a range of off-farm activities in rural areas, as well as on income from urban areas. Local production systems are becoming more integrated into the global economy, with export crops expanding into areas previously used for locally consumed products. International migration generates major financial flows (remittances), which may affect local relations in the home country. Socio-cultural change driven by the cheaper communication technology and easier cultural exchange is affecting the way “tradition” is interpreted. Government policies and laws struggle to be properly implemented in rural areas, but nonetheless produce intended or unintended outcomes that affect social relations on the ground.

These and many other changes have important repercussions for local land relations, and are affecting the way customary tenure systems operate. This chapter reviews some of the main factors driving change in customary land tenure. Inevitably, the chapter is far from exhaustive, both in identifying factors driving change and in spelling out their land

3. Lorenzo Cotula is responsible for the content of this chapter. Bernardete Neves provided invaluable help with the quantitative data and with tables and charts.



tenure implications. The relative importance of these “drivers of change” varies very substantially across and even within countries. The implications of similar changes for different land tenure contexts are also likely to vary. While the land tenure implications of some of these factors are well documented, for others linkages are likely but not yet empirically documented, and we can only put forward some hypotheses.

2.2. DEMOGRAPHIC CHANGE

Over the past decades, many parts of Africa have experienced strong demographic growth. Average population growth rates (“annual national increase” in Table 2.1) for Africa were 2.2% in 1950 and in 2005, although projections suggest that this rate is to decrease over the next decades (down to 1.7% in 2030; see Table 2.1). Such average data mask important differences, however. Population growth rates seem in line with continent-wide average rates in countries like Kenya, Mozambique, Rwanda and Tanzania; but are consistently above average in Mali, Niger and Uganda, and substantially below in countries worst affected by HIV/AIDS (e.g. Botswana, Lesotho). Projected average data also mask differences. While in countries like Tanzania and Rwanda population growth rates are expected to decrease, such rates are projected to remain at current levels or even increase in Niger and Uganda. This strong demographic growth (together with relatively short life expectancies) is also reflected in the age structure, with a very substantial proportion of the population under 15 (see Table 2.1).

As a result of demographic growth, population density has increased substantially (see Figure 2.1). Population density figures increase dramatically if related (not to the entire land area of a country but) to arable land. This is due to the fact that a substantial part of the country may be occupied by desert or barren lands. Again, data on population density on arable land is extremely variable, ranging from 2.3 in Niger to 6.0 in Kenya and Rwanda and 7.2 in Tanzania (see Table 2.1 and Figure 2.2).

Demographic growth may have profound implications for land tenure arrangements. By changing the ratio between labour and land, it can lead to increased competition over more scarce land resources. According to the so-called “evolutionary theory of land rights”, demographic growth and agricultural intensification increase the value of land and lead to a progressive transition from communal tenure toward greater individualisation of land rights. This entails the concentration of the bundle of rights in the hands of a single right holder, and translates into increasingly monetarised access to land through sales and rental (Boserup, 1965; for a critique, see Platteau, 1992 and 2000; Colin, 2005).

Evidence from different parts of Africa supports the key tenets of this theory. In Kenya, land tenure individualisation processes matching demographic growth took place within

TABLE 2.1 DEMOGRAPHIC TRENDS IN AFRICA, SELECTED COUNTRIES

Regions and Countries	Total Population (millions) (2)		Population density, 2005 (2) (persons per ha)	Population per cropland, 2001 (2) (persons per ha)	Annual natural increase (%)			Age structure 2005 (%) (1)	
	1960	2005			1950 (3)	2005 (1)	2030 (3)	under 15	over 65
World	3 023.8	6 464.8	0.5	-	1.8	1.2	0.7	26	7
Africa	281.7	906.0	0.3	-	2.2	2.2	1.7	42	3
Mali	4.3	13.5	0.1	2.7	2.2	3.2	2.4	47	3
Niger	3.5	14.0	0.1	2.3	2.9	3.4	3.0	48	2
Uganda	6.6	28.8	1.2	3.2	2.6	3.2	3.5	51	2
Rwanda	2.9	9.0	3.4	6.0	2.8	2.3	1.4	44	2
Kenya	8.1	34.3	0.6	6.0	2.8	2.2	2.3	43	2
Tanzania	10.0	38.3	0.4	7.2	2.6	2.4	1.2	45	3
Mozambique	7.6	19.8	0.2	4.3	1.5	2.2	1.4	44	3
Botswana	0.6	1.8	0.0	4.6	2.6	-0.3	-0.2	39	4
Lesotho	0.9	1.8	0.6	5.4	1.4	-0.1	-0.3	38	5
Swaziland	0.4	1.0	0.6	5.7	2.5	0.3	-0.1	43	3
South Africa	17.4	47.4	0.4	2.7	2.3	0.7	0.0	33	4

Notes

Population density: total population divided by total land area;

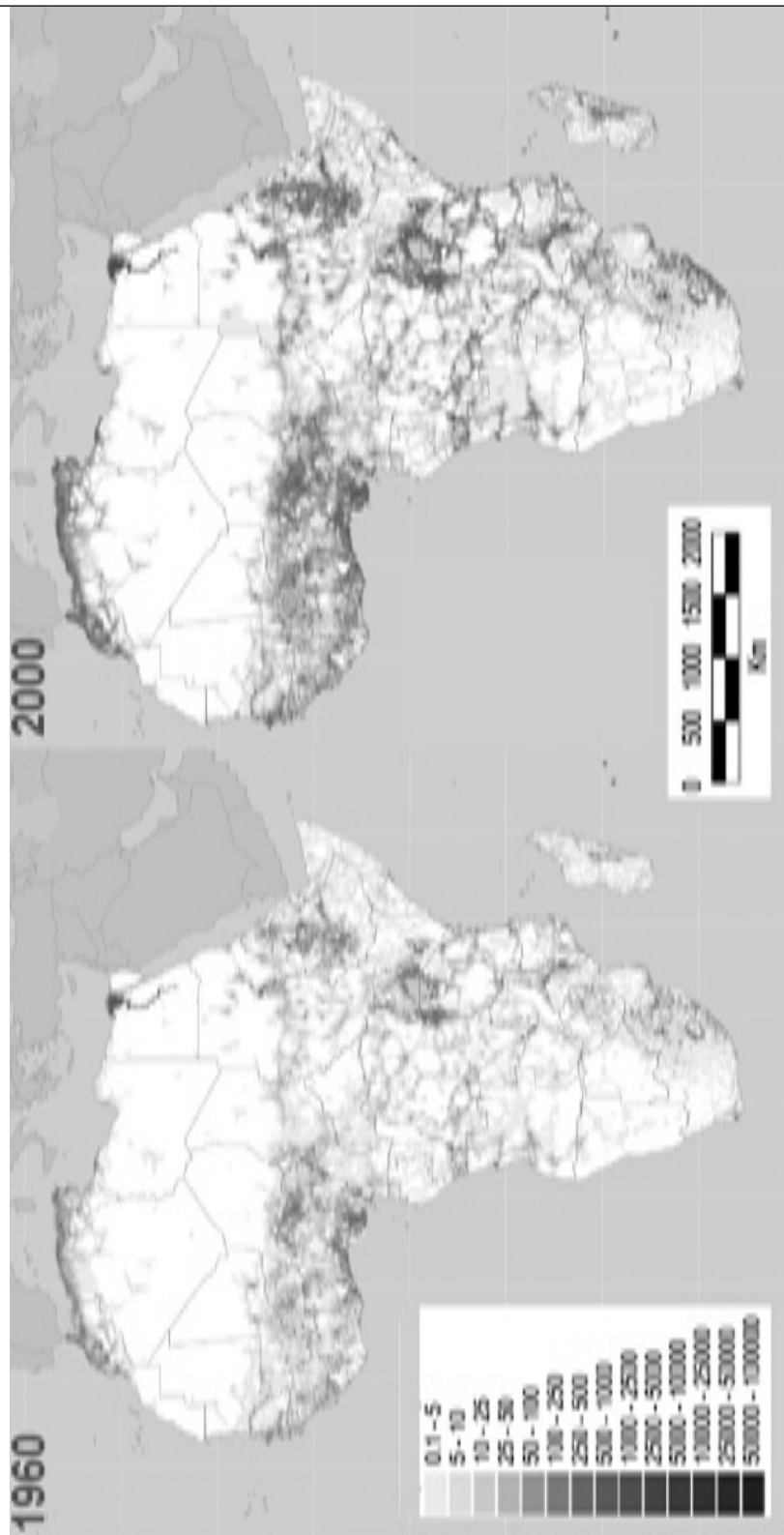
Population per cropland: total population divided by total arable land area;

Annual natural increase: ratio between number of births and deaths in a given year, excluding inputs or outputs from migration;

Age structure: percentage of total population under 15 and over 65 years of age.

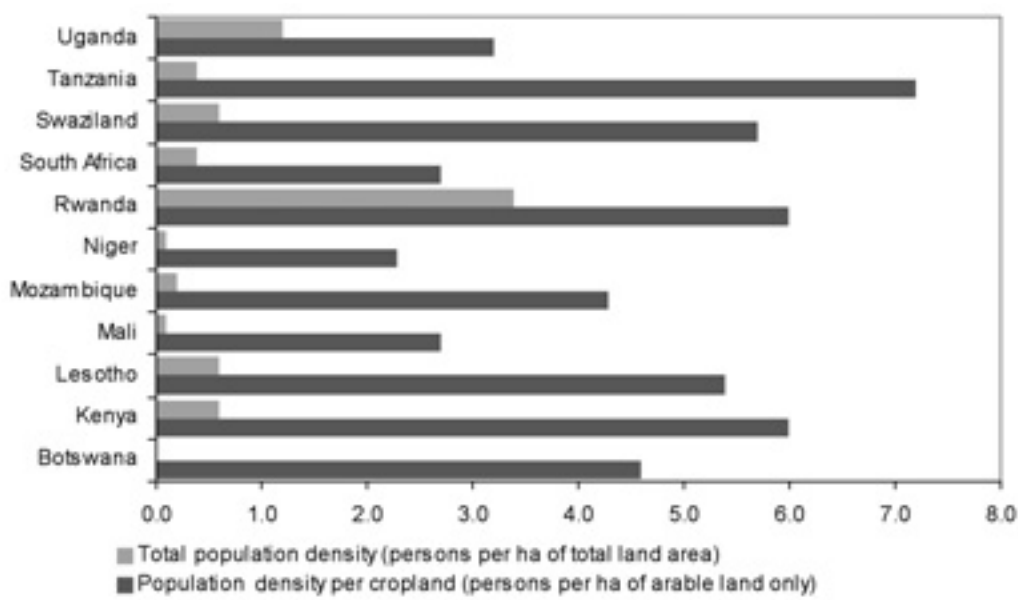
Sources: (1)- Population Reference Bureau, 2005; (2) United Nations Population Division, 2005; (3) United Nations Population Division, 2004.

FIGURE 2.1 POPULATION DENSITY IN AFRICA, IN 1960 AND 2000



Source: UNEP, 2004.

FIGURE 2.2 POPULATION DENSITY PER TOTAL LAND AREA AND PER CROPLAND AREA



Source of Data: UN Population Division, 2005

Luo, Kikuyu and Akamba customary tenure, and land markets have developed since the 1930s (Tiffen *et al.*, 1994). In Machakos District, where Kenya's longstanding land registration programme was implemented late (after 1968) and slowly (by 1992 registration had been completed in only 35% of sub-locations), demographic growth and agricultural profitability have fostered agricultural intensification, and customary tenure has responded by evolving toward greater individualisation and allowing land transfers. In 1964 (i.e. *before* the implementation of the registration programme that formalised land tenure in the District), 28% of the farmers in Kangundo had purchased at least one of their plots (Tiffen *et al.*, 1994).

However, the picture is often more complex than this linear model seems to suggest. Local contexts being extremely diverse, the linkages between demographic growth and land relations are also likely to vary substantially. In some cases, for instance, land transactions may emerge even in the absence of strong population pressures, while growing population pressure may perpetuate or even reinforce the collective elements of local land tenure systems. These complexities are documented in the chapter on the emergence of monetarised transactions (which the evolutionary theory sees as the culmination of the individualisation process). The implications and limitations of the evolutionary theory will be discussed more in detail in that chapter (see chapter 5).

2.3. URBANISATION

Across Africa, urban centres are growing fast. While in 1950 only 14.9% of the continent's population lived in urban settlements, 39.7% did so in 2005 and 53.5% are expected to do so by 2030 (see Table 2.2). And, population growth is stronger in towns (3.56%) than in rural areas (1.34%). Again, average data mask very substantial variations. While South Africa was substantially urbanised in 1950 already, other countries have witnessed major change (the urban population jumped from 2.5 to 52.5% in Botswana). Current levels of urbanisation also vary (from Uganda's 12.4% to South Africa's 57.9%).

Such increasing urbanisation has important implications for land use and tenure. Unregulated urban expansion entails the conversion of land from agricultural to residential use. These processes are usually accompanied by the erosion of customary tenure systems and the emergence or consolidation of more individualised forms of tenure. Urbanisation also fosters demand for food products in towns, which in turn boosts processes of agricultural intensification and commercialisation in peri-urban areas (Cotula *et al.*, 2004). Many field studies from peri-urban areas have shown that

Regions and Countries	Total Urban Population (% of total population)			Urban Population Growth (annual change in %)		Rural Population Growth (annual change in %)	
	1950	2005	2030	2005	2030	2005	2030
World	29.1	49.2	60.8	2.09	1.54	0.42	-0.54
Africa	14.9	39.7	53.5	3.56	2.67	1.34	0.39
Mali	8.5	33.7	52.0	5.17	4.31	1.98	1.33
Niger	4.9	23.3	41.1	6.08	5.34	2.93	1.99
Uganda	3.1	12.4	20.4	3.90	5.84	3.15	2.40
Rwanda	1.8	21.8	58.5	11.59	2.85	0.17	-0.35
Kenya	5.6	41.6	62.7	4.42	1.70	-0.43	-1.12
Tanzania	3.8	37.5	58.2	4.94	2.59	0.32	-0.47
Mozambique	2.5	38.0	60.0	5.09	2.20	-0.05	-0.73
Botswana	2.5	52.5	65.7	1.77	0.19	-0.11	-2.20
South Africa	43.1	57.9	70.1	1.43	0.33	-0.51	-1.93

Source: United Nations (2003)

subsistence food crops, largely cultivated by women, are being replaced by male-dominated food production which is oriented towards marketing produce in neighbouring towns. In these areas, customary land tenure is becoming increasingly individualised, informal land markets are growing, land values soaring and disputes increasing (see for instance Mengho, 1999 on Brazzaville; Fodouop, 1999, on Cameroon; N'Bessa, 1999, on Cotonou).

These processes of change in land relations in peri-urban areas can be accelerated by urban elites (public officials, businessmen, politicians, etc.) seeking to buy land, either for personal use (residential or commercial agriculture) or, often, for speculation purposes. As land values rise, farmers may be forced or tempted to sell their land. Where land is still under customary chiefs, these may be tempted to sell off lands for housing and other developments, regardless of the views of those actually farming this land (Cotula *et al.*, 2004). Further from urban centres, small farmers are facing increased pressures from agri-business interests, that seek land to satisfy urban demand for food or to produce cash crops (see e.g. the spread of commercial flower farming around Addis Adaba) (Cotula *et al.*, 2004).

Finally, in much of sub-Saharan Africa, this process of rapid urbanisation is affecting land relations in rural areas. Many rural households crucially depend on urban incomes for their livelihoods, as a result of the substantial migration from rural to urban areas. In countries as diverse as Nigeria, Mali and Tanzania, remittances from rural-urban migration have helped diversify livelihoods in rural areas (Tacoli, 2002; on livelihood diversification, see below). In South Africa, large numbers of male youths have migrated to towns to take up formal or informal employment; household members remaining in the rural former “homelands” largely depend on remittances and/or state pensions for their livelihoods. This has important implications for land relations in rural areas (James, 2001; see section 2.5).

2.4. INTEGRATION IN THE WORLD ECONOMY

Trade between Africa and other parts of the world is not a new phenomenon. For many centuries, traders exchanged goods by sea and across the Sahara. Such exchanges increased with colonialism, and many newly independent states were highly dependent on the exportation of a limited number of commodities and on preferential access to European markets.⁴

4. With the establishment of the European Community, preferential trade relations between former colonies and former colonisers were taken over by the Community, under the two successive Yaoundé Conventions first, the four Lomé Conventions then, and, currently, the Cotonou Agreement.

TABLE 2.3. DATE OF GATT /WTO MEMBERSHIP

Jun 1948 South Africa	Oct 1962 Uganda	Feb 1982 Zambia	Apl 1994 Angola
Jul 1948 Zimbabwe	Dec 1963 Niger	Jan 1988 Lesotho	Dec 1994 Guinea
Oct 1957 Ghana	Sep 1963 Benin	Jul 1992 Mozambique	Jan 1997 Congo, DR
Nov 1960 Nigeria	Feb 1964 Kenya	Sep 1992 Namibia	Mar 1997 Congo
Dec 1961 Tanzania	Jan 1966 Rwanda	Jan 1993 Mali	
May 1961 Sierra Leone	Sep 1971 Zaire	Feb 1993 Swaziland	

Source: WTO website.

TABLE 2.4 RELATIVE IMPORTANCE OF TRADE IN SELECTED AFRICAN COUNTRIES (1990-2004)

	Exports of Goods and Services (as % of GDP)		Imports of Goods and Services (as % of GDP)	
	1990	2004	1990	2004
Sub-Saharan Africa	27	32	26	33
Mali	17	28	34	36
Niger	15	16	22	26
Uganda	7	14	19	28
Rwanda	6	10	14	27
Kenya	26	26	31	32
Tanzania	13	19	38	29
Mozambique	8	30	36	38
Botswana	55	40	50	32
Lesotho	17	48	122	105
Swaziland	75	84	87	92
South Africa	24	27	19	27

Source: WTO website.

TABLE 2.5 EXTERNAL FINANCING INTO SUB-SAHARAN AFRICA, SELECTED COUNTRIES (2000-2004)

	Workers' remittances and compensation of employees received (US\$ million)		Foreign direct investment, net inflows (US\$ million)	
	2000	2004	2000	2004
Mali	73.0	153.8	82.0	180.0
Niger	14.0	25.5	8.0	No data
Uganda	238.0	306.1	161.0	220.0
Rwanda	7.0	9.8	8.0	7.7
Kenya	537.9	494.3	111.0	46.1
Tanzania	8.0	10.9	463.0	249.1
Mozambique	37.0	58.0	139.0	244.7
Botswana	26.0	38.9	57.0	46.8
Lesotho	252.0	355.0	118.0	123.5
Swaziland	74.0	88.8	91.0	68.5
South Africa	344.0	521.0	969.0	585.0

Source: World Bank, 2006a.

In recent years, many African countries have eased restrictions on international trade and intensified efforts to attract foreign investment. Since the 1980s, most countries underwent structural adjustment programmes that entailed, among other things, trade liberalisation. Many countries have joined the WTO, which entails not only access to international markets but also liberalisation of imports (albeit under the “special and differentiated treatment” for “least developed countries”). Longstanding trade preferences with Europe are also being renegotiated as reciprocal free trade agreements, while the privileged market access provided by those arrangements is being eroded as a result of multilateral liberalisation under the WTO.

At a global level, Africa’s share of world trade remains very small. In 1999, Africa generated 2% of world exports (Toulmin and Wisner, 2005, using UN data). However, for many African countries, the relative importance of international trade has grown over the past decade, and the level of integration in the world economy is increasing (see Table 2.4). In valuable lands, crops are being replaced by cash crops (e.g. cocoa in Ghana since the 1940s and mangos and pineapples more recently; flower farming in parts of Kenya and Ethiopia over the past ten years). These processes may have important implications for land tenure arrangements at the local level. Export crops may increase the value of the land and trigger processes of individualisation of tenure, reinterpretation of the land tenure prerogatives of the customary chiefs (from custodianship to ownership), and land disputes (e.g. on Ghana, see Mortimore, 1997, and Amanor, 1999).

Another aspect of the growing integration in the world economy relates to international migration and the important financial flows that this can generate. The global volume of remittances is widely acknowledged to be huge, even if the figure cannot be determined with any accuracy because untold numbers of migrants avoid the formal banking services. For this reason, available figures are likely to greatly underestimate the size of remittance flows. The World Bank (2006c) estimates that in 2005 remittances to developing countries amounted to \$166.9 billion, up from \$57.8 billion in 1998. This amount is over three times the level of aid-related flows (\$52.6 billion) and second only to foreign direct investment (some \$237 billion) as a source of external funding for developing countries. However, these amounts are not evenly distributed between countries and regions, and tend to be concentrated in areas with strong migratory traditions (see Table 2.5 and Figure 2.3). In sub-Saharan Africa, international remittances amounted to \$3.2 billion in 1998 (World Bank, 2006c). Within Africa, the picture is also highly diverse, as illustrated by Table 2.5.

These international financial flows may affect local land relations. The linkages between remittances and access to land are extremely complex and likely to vary considerably from place to place, depending on the nature of migration, on the local economic, socio-

cultural and ecological context, and so on. These linkages can take many different forms, such as:

- *enabling remittance recipients to purchase land*, either formally or informally, especially in high-value lands (peri-urban areas, irrigated plots);
- *enabling remittance recipients to secure their land rights*, including by paying for titling processes, by releasing land through paying out mortgages and, more generally, by making more productive use of land through hired labour and agricultural inputs (e.g., in many francophone West African countries, land rights are conditional upon productive land use – “mise en valeur”);
- *enabling to pay for leases and rentals*, particularly where land sales are prohibited, or where individuals or groups are not prepared to sell family land (e.g., most commonly for agricultural lands in the Eastern Region of Ghana);
- *affecting land loan dynamics*, with migrant households temporarily increasing their land for cultivation by borrowing plots, and with migrant land-owning households who had lent to others and who are now able to cultivate more land through hired labour and agricultural inputs claiming back their lands;
- *affecting inheritance practices*, as grateful testators may favour remittance senders to other family members (Cotula and Toulmin, 2004).

Remittances may also exacerbate the effects of other factors. For instance, remittance-supported land purchases may contribute to the transition from agricultural to residential use, particularly in peri-urban areas. Where valuable land – whether high quality farmland or residential plots – has become scarce as a result of a variety of socio-economic changes (namely demographic pressure), remittances – by increasing demand for valuable land – may fuel competition, chaotic land markets, increased land tenure individualisation and land disputes (Cotula and Toulmin, 2004).

International remittances may also affect land distribution. Because long-distance migration requires a minimum level of information, contacts and resources, those who migrate are likely to be among the better-off within the community, at least in a first stage (Adams, 1996; de Haas, 2003). These better-off households are therefore more likely to receive remittances, which they can use to buy land and other key resources, set up new businesses and improve their children’s education, thereby further widening the gap with non-migrant households. However, this distributive impact may change over time. Information may become more readily available, and migrants’ networks abroad may motivate and help others to follow. Therefore, poorer households may also be able to

seize the opportunities offered by migration, thereby possibly off-setting negative distributive impacts in the longer term (Adams, 1996; de Haas, 2003).

BOX 2.1. PURCHASES OF RESIDENTIAL LAND IN PERI-URBAN ACCRA, GHANA

In peri-urban Accra, migrants overseas are key players in a chaotic market for residential land. Typically, migrants buy land from individuals or family heads, with a family member or a friend acting as intermediary. Landowners prefer selling to migrants rather than to locals, knowing that migrants have ready cash and are able to pay higher prices. This process is pushing land prices up, making it more difficult for locals to gain or maintain access to land. In many areas, agricultural lands are being converted to residential use. Customary chiefs and family heads are selling common lands for personal benefit, often without consultation of, or compensation for those who lose out. Sometimes, a family member sells land without having the right to do so; in these cases, the buyer quickly erects a building in order to consolidate his claim to the land; other family members would then try to stop him/her from doing so, and to recover the land or to obtain a price for it. Multiple sales of the same plot have also been reported. As a result, land disputes are mushrooming, while the impact of all this on poorer farmers needs to be monitored carefully.

Source: Cotula and Toulmin, 2004

2.5. SOCIO-ECONOMIC AND CULTURAL CHANGE

Changes in local livelihood systems, in cultural patterns and in local socio-economic relations may also have important implications for customary tenure. These changes may in turn be partly driven by some of the factors examined in the previous sections – such as growing urbanisation, integration in the world economy, and others.

Livelihood diversification illustrates this. It refers to “the continual adaptive process whereby householders add new activities, maintain existing ones and drop others, thereby maintaining diverse and constantly changing livelihood portfolios” (Ellis and Allison, 2004:1). Studies show that, in Africa, some 50 percent of rural household incomes are generated from off-farm activities in rural areas and/or from transfers from urban areas or from overseas (including pensions and remittances) (Ellis and Allison, 2004). A study from Niger and Mali has shown how rural livelihoods have become more diversified since the 1970s, including through rural to urban migration and migration to the coastal states of West Africa or even to Europe (Baro and Batterbury, 2005).

Livelihood diversification may entail taking up different agricultural activities. In the Sahel, rural livelihoods have substantially diversified since the droughts of the 1970s and 80s. In order to better manage risk, many farmers have taken up herding, and herders farming. As a result, rather than herding or farming, many rural households now practice a combination of both (agropastoralism). In many parts of the Sahel, this has had

repercussions on customary resource tenure systems. When a clear division of labour existed between herding and farming communities, arrangements were established to make the most of this complementarity. Among other things, herders needed access to post-harvest fields for grazing, and farmers needed manure for their fields. “Manure contracts” enabled both parties to meet these respective needs. But where farmers have acquired their livestock, they no longer need incoming herders for access to milk and manure. In many places, this, coupled with demographic pressure, has contributed to a breakdown of relations between “herding” and “farming” communities, and to an increase in natural resource conflict.

Diversification of livelihoods may also entail development of off-farm activities in rural areas, and migration to urban areas or abroad. Even in these contexts, however, land access may remain valuable both as a productive asset contributing to a diversified livelihood portfolio and as a safety net in times of crises. At the same time, off-farm livelihood diversification may have repercussions on land tenure systems, particularly in relation to the increased access to monetarised income that it may entail, which may promote the emergence of land transactions (for a more detailed discussion of this in relation to livelihood diversification in the form of international migration, see section 2.4).

Livelihood diversification patterns are highly differentiated – “the better off tend to diversify in the form of non-farm business activities (trade, transport, shop keeping, brick making etc.) while the poor tend to diversify in the form of casual wage work, especially on farm” (Ellis and Allison, 2004:1). The land tenure implications of such differentiated diversification may also be differentiated, with better-off groups using their greater access to income to strengthen and/or increase their land access (e.g., on international migration, see section 2.4).

Gendered livelihood diversification may also produce repercussions on land tenure. When off-farm activities or migration are usually undertaken by men, women’s responsibilities for agriculture increase – what is referred to by some as the “feminisation of agriculture”. Some authors suggest that this increased burden is accompanied by greater decision-making power for women within the household. Others note that this effect is very limited, as women tend to remain under the “protection” of the extended family (David, 1995; de Haas, 2003). On the other hand, in areas with increasing land scarcity and limited off-farm opportunities, there are reports that women are being deprived of their land access, including through the “rediscovery” of norms on women seclusion based on religious/customary practice (e.g., for a study on the “defeminisation of agriculture” in Maradi, Niger, see Doka and Monimart, 2004).

Besides livelihood diversification, other examples of change in local socio-economic relations include the monetarisation of the economy and the fragmentation of the extended family. The monetarisation of the economy may be associated with income earned through more diversified livelihoods. Its relationships with changes in land tenure systems will be explored in chapter 5. The land tenure implications of processes of fragmentation of extended family units will be examined in chapter 4 and, to a lesser extent, in chapter 5.

Cultural change linked to changes in livelihoods may also affect land tenure systems. Migration abroad or to urban areas may result in young migrants being exposed to different cultural models, and may make them more prepared to challenge customary rules and institutions. This is illustrated by research from North Africa. In Southern Morocco, for instance, migration accelerated the erosion of customary land and water authorities through the partial emancipation of formerly “inferior” groups, as they became more confident and started to challenge customary rules and institutions dominated by traditional elites (de Haas, 2003).

2.6. HIV/AIDS

The HIV/AIDS epidemic is devastating the African continent, especially Southern African countries. HIV/AIDS incidence is much higher in Africa than in other parts of the world. In several Southern African countries, incidence rates are appallingly high (affecting beyond one third of the total population in countries like Botswana and Swaziland; see Table 2.6). Besides its tragic death toll, the epidemic is having a major economic impact on the worst affected countries. Among the known impacts of HIV/AIDS are major demographic shifts, shortened adult life expectancy, and adverse trajectories for savings, investment, education, health and the intergenerational transmission of assets and skills (de Waal, 2005:127). And, the HIV/AIDS epidemic may affect economic productivity, and reduce the available labour force. HIV/AIDS also has major impacts on land use, and may have main implications for land rights systems, including by change in customary practices.

World1.2	Africa.....6.1	Rwanda.....5.1	Botswana37.3
	Mali.....1.9	Kenya6.7	Lesotho28.9
	Niger.....1.2	Tanzania7.0	Swaziland38.8
	Uganda7.1	Mozambique..12.2	South Africa ..21.5
Source: PRB, 2005.			

Case studies from Kenya, Lesotho and South Africa (Drimie, 2002) have documented the effects of HIV/AIDS on land use, on land rights, and on land administration systems. As for land use, the main effects relate to loss of labour force caused by the disease. This may entail that households are no longer able to farm their lands at the level required to meet their subsistence needs. For instance, the case study from Lesotho found lower agricultural yields as some land farming activities had to be abandoned or postponed due to labour shortages. In some cases, households are able to cope with increased vulnerability by hiring labour, by renting out land, by entering into sharecropping arrangements and/or by selling land. Hiring external labour requires resources to pay wages and is therefore limited to the households that can afford it. Renting out land provides families with constant cash flow but is often constrained by underdeveloped or even prohibited land rental markets. Entering into sharecropping arrangements in a situation of vulnerability, such as that caused by a HIV/AIDS-affected “breadwinning” family member, weakens the negotiating power of the family vis-à-vis third parties. Where families are unable to respond to the situation, land may be left fallow or under-cultivated. Besides negatively affecting agricultural productivity, this may create problems in countries where effective occupancy and use regulations require land forfeiture in case of non- or under-use. For instance, Lesotho’s Land Act 1979 provides for land reallocation if the land is not cultivated for two years. This measure, originally conceived on productivity and equity grounds, entails that HIV/AIDS-affected families may lose their land if they are unable to cultivate it. In Lesotho, the case study found that some customary chiefs informally granted special concessions to families stricken by the disease (Drimie, 2002).

As for land rights, HIV/AIDS may lead to land loss as a result of distress sales, as poorer households may be forced to sell their land to pay for medical care and funerals. This may enable wealthier elites to acquire new land, with consequent impacts on land distribution (Drimie, 2002; Villarreal, 2006). However, a case study from South Africa suggests that land sale is seen as a very last resort, as families prefer to divest other assets like livestock first (Drimie, 2002).

Available evidence also shows land grabbing by male relatives following the death of a husband/father. Indeed, widows rarely inherit land under customary norms, and they are often deprived of their access to their husband’s land if they have no children. On the other hand, orphans may be too young to inherit. Land is therefore vested in trusteeship with uncles and other male relatives, and inherited by children when they become of age. However, there were reports of uncles cheating orphans out of inheritance, sometimes exploiting the stigma attached to HIV/AIDS (Drimie, 2002). While these customary inheritance norms are not new, they have acquired a new relevance with the high death toll that HIV/AIDS is causing, particularly in southern African countries (Villarreal, 2006). And, HIV/AIDS may itself foster changes in customary practices. In some parts of Africa, for

instance, the institution of levirate (whereby “a widow is to marry a brother or other close relative of the deceased upon his death”; Villarreal, 2006:2) is still practiced despite legislative prohibitions. Levirate preserves male property rights, while also enabling widows to continue to access land after their husband’s death (Villarreal, 2006). However, evidence from Kenya shows that the suspicion that the widow of a man who died of AIDS is also an HIV/AIDS carrier is making remarriage difficult, leaving widows without access to land (Villarreal, 2006). Overall, evidence suggests that HIV/AIDS reinforces tendencies for the loss of land rights by orphans and single women, linked to the conservation of rights by members of the extended family.

However, a recent study (Aliber *et al.*, 2004 and 2006) cautioned against overstating the land tenure implications of HIV/AIDS. Drawing on evidence from Kenya, the authors of this study concluded that, while tenure insecurity in the study areas was “rife”, it threatened both households affected by HIV/AIDS and households not affected by it. Insecurity of land access for surviving widows seemed to be linked to population pressure and gendered power relations; and the stigma associated with HIV/AIDS could reinforce (rather than cause) such insecurity. Excluding “some anecdotal evidence”, they found no proof that HIV/AIDS triggers tenure threats *beyond* those more broadly associated with gender relations and with customary land rights (Aliber *et al.*, 2004 and 2006).

2.7. CONFLICT

Armed conflict has devastated many parts of Africa – such as the Great Lakes region, Sudan, Somalia, the Mano River region (Liberia, Sierra Leone), Ivory Coast and many other areas. Besides bringing about death and destruction, armed conflict may affect land relations, and disrupt land tenure systems. In fact, armed conflict and land relations are linked in two main ways, which vary from context to context. On the one hand, control over land and natural resources may constitute a factor underlying conflict. This is more likely where strong demographic growth is not accompanied by increases in productivity, or by new opportunities to acquire income from non-agricultural activities (FAO, 2005). As a result, competition over land increases. This competition may be manipulated by elites to gain or maintain power. In other words, competition over scarce land, together with lack of off-farm opportunities, frustration and lack of hope for the youth and other factors, may create a context of instability where other “trigger” factors like political or ethnic manipulation may lead to violent conflict. In Rwanda, for instance, unequal access to land was one of the structural causes of poverty which was exploited by the organisers of the genocide (Huggins *et al.*, 2005). During the genocide, violence was directed not just at Tutsi; but also at Hutu involved in land disputes (Huggins *et al.*, 2005). In Liberia, the marginalisation of youths and their exclusion from access to land, linked to the

gerontocracy characterising customary socio-political and land tenure relations, fuelled a sense of frustration and played an important role in motivating youths to join militias (Richards, 2005).

On the other hand, armed conflict may disrupt local land tenure systems – and in this sense contribute to changes in customary rules and institutions. This may be linked to the large-scale resettlement processes that may be associated with conflict. In parts of Burkina Faso, the large-scale return of migrants from war-torn Ivory Coast increased pressure on land and pushed towards greater monetarisation of land relations (see Box 2.2). And, the chaos generated by wars may weaken the customary or local institutions managing and administering land rights, thereby generating widespread tenure insecurity, fostering land disputes, and enabling elites to grab land. In some cases, however, customary institutions continue to function despite the upheaval caused by conflict, and may play a key role in regulating land relations in post-conflict situations (for instance, on the “*regulos*” in Mozambique, see Norfolk, 2004).

BOX 2.2. RETURN MIGRATION FROM IVORY COAST AND LAND RELATIONS IN BURKINA FASO

The armed conflict in Ivory Coast has driven some 350,000 Burkinabé migrants back to Burkina Faso. This return migration started with the first land-related conflict in Ivory Coast in 1999 and peaked with the escalation of violence in Ivory Coast in 2002. Return migrants have not necessarily gone back to the areas where they or their family originated from, but have also moved to other areas of Burkina Faso made attractive by the availability of land or by other factors. The Comoé Province of Burkina Faso, at the border with Ivory Coast and until recently largely untouched by immigration, has experienced massive migration inflows. In Niangoloko, Sidéradougou and Mangodara departments, migrants (mainly return migrants from Ivory Coast) now constitute 47% of the population. In Sidéradougou, 81% of migrants arrived after 1999.

This massive influx of return migrants has profoundly affected land relations – despite the very short period of time in which this has happened. While under customary law migrants would be settled through non-monetarised arrangements establishing long-term patron-client relations (“*tutorat*”; see chapter 5), the past few years have witnessed a strong monetarisation of land transactions and the emergence of land “sales”. In the village of Dégué-Dégué, “sales” jumped from two up to 27 between 1999 and 2002, following the arrival of return migrants from Ivory Coast. Land prices have spiralled by the month – from 15,000 FCFA/ha in 2003 to 70,000 FCFA/ha in 2004. Most of those purchasing land are return migrants, although some urban elites have also come to the area. This has exacerbated competition for land and in some areas fostered conflict not only between autochthons and return migrants but also between autochthons (over the right to “sell” land to migrants).

Source: Dabiré and Zongo, 2005.

2.8. PUBLIC POLICY AND LEGISLATION

Local land relations have also been profoundly affected by decades of colonial and post-independence government interventions. Such interventions have stratified over time, from colonial legislation (on the one hand inspired by the legal tradition of the colonial power, on the other characterised by authoritarian and centralised resource control) to post-independence legislation (still influenced by the legal tradition of the former colonial power, but also, in many countries, by “socialist” principles and, more recently, by assistance provided by developing agencies). They include land nationalisation and centralised resource management, land registration programmes, devolution of land management responsibilities to local government bodies, and many others. Besides formal policy and legislation, other forms of government interference may also affect local land relations by triggering anticipation and positioning strategies – as evidenced by the repercussions of the radio announcement of Ivory Coast’s president Houphouët-Boigny that “land belongs to the tiller” (Lavigne Delville, pers. comm.).

The extent to which government action has managed to reach rural areas in Africa has long been debated in the literature, ranging from positions emphasising the limited impact of government policy in rural areas (see in particular Hyden, 1983, and his concept of “uncaptured peasants”); to others that emphasise how government action has substantially affected the lives of rural populations, though not necessarily in the way hoped for by policy makers (Berry, 1993). According to the latter view, the implementation and outcomes of government interventions (e.g. legislation, public spending) are the result of the interplay between the many actors involved – from government officials to development agents to local farmers (Berry, 1993). In Africa, government interventions in land relations have produced both intended and unintended outcomes, which depend on the way those interventions have been anticipated, reinterpreted and manipulated at the local level (see e.g. Lund, 1998; Lavigne Delville *et al.*, 2001). Within this context, government interventions have affected the way “customary” land tenure systems operate.

This is particularly evident where legislators have sought to codify “custom” or have empowered courts to apply it. In doing this, colonial and post-independence legislators, courts and officials usually relied on information supplied by intermediaries, who were typically male elites. This favoured biased interpretations of customary law. More generally, this tended to distort the content of customary law (e.g. on Kenya, Mackenzie, 1998; for an example of this from Ghana, see Box 2.3). And, attempts to codify and/or judicially to apply customary norms have led to a gap between the “juristic” re-elaboration of customary law used by lawyers and courts,

and the customary rules followed by resource users on the ground (e.g. on Ghana, Date-Bah, 1998; see Box 2.3). In a recent case from South Africa, the Constitutional Court refused to be constrained by the apartheid-era codification of customary law, referring instead to the body of norms as they are applied by local groups (*Alexor Ltd v. The Richterveld Community*, 2003).⁵

BOX 2.3. THE ROLE OF COURTS IN SHAPING CHANGE IN CUSTOMARY SYSTEMS IN GHANA

In Ghana, customary tenure systems have been much changed by decades of colonial and post-independence legislation. On the one hand, such legislation has restricted the land and natural resource management responsibilities of customary authorities, and regulated their internal functioning. On the other, it has entrenched the powers. The Administration of the Stool Lands Act created a government agency responsible for collecting resource fees on behalf of the chiefs. This law also regulates the way those fees are then redistributed by such agency between different chiefs and local government bodies.

Parallel to these legislative developments, customary law has been reinterpreted and changed as result of its application by courts. In Ghana, courts applied customary law since colonial times. The Supreme Court Ordinance 1876 establishing a Supreme Court for the Gold Coast (as Ghana was then known) enabled the Court to apply customary law (section 19, quoted in Date-Bah, 1998). As a result, formally trained lawyers have long handled customary law issues. Differences began to emerge between the customary law followed on the ground and that applied by courts (Date-Bah, 1998).

In several occasions, court decisions “accompanied” a process of change that was taking place under customary law – on the one hand, taking note of ongoing changes as documented for specific sites, on the other promoting change by generalising site-specific evolutions to other parts of the country. In *Kotei v Asere Stool*, the Privy Council stated that “native law and custom in Ghana has progressed so far as to transform the usufructuary rights [...] into an estate or interest in the land” which an individual could sell “so long as he does not prejudice the right of the paramount Stool to its customary services” (quoted in Date-Bah, 1998:401). In deciding this case, the Privy Council seconded a process of land tenure individualisation going on in parts of Ghana, with community members gaining more individualised rights over stool/skin lands.

Profound implications for customary tenure systems have also stemmed from government interventions aimed not at recognising those systems but at abolishing them – either through registration programmes aimed at replacing customary law with private ownership (see Box 2.4 on Kenya) or through legislation vesting land ownership and management responsibility with government agencies. While these interventions rarely succeeded in replacing customary systems, they often affected

5. Under the South African Constitution, customary law is a source of law to be applied by courts.

their functioning and, in many cases, they affected the effectiveness of customary institutions as well as their legitimacy (as legislation set up competing authorities to perform similar functions). And, by changing the nature and context of customary rights, such interventions may have had important distributional consequences, typically eroding “secondary” land rights (such as those of pastoralists and women; see Box 2.4.).

In recent years, decentralisation processes have been initiated or consolidated in several African countries. In some cases, newly established local government bodies are given responsibility for land/natural resource management (e.g. Tanzania, Senegal, Mali). This has further complicated the issue, as new local government bodies must come to terms with customary institutions. The complex dynamics between decentralisation policies and customary land tenure systems will be explored more in depth in chapter 3 and in our case study from the Inner Niger Delta, Mali (chapter 6).

BOX 2.4. LAND REGISTRATION AND WOMEN’S CUSTOMARY RIGHTS IN KENYA

In Kenya, a land tenure reform to register customary rights and convert them into freehold was adopted by the colonial authority and continued by the post-independence government (Swynnerton Plan of 1954; Registered Land Act of 1963; Land Adjudication Act of 1968). The reform intervened in a context where customary law was evolving towards increasing individualisation, with an erosion of women’s customary land rights. In this context, the implementation of the land registration programme, carried out in a period in which gender was not high in the development agenda, accelerated the individualisation process and further curtailed women’s land rights. Firstly, land adjudication committees were male-dominated; in Luoland, for instance, all adjudication committee members were male (Shipton, 1988). Moreover, although all land rights, including under customary law, had to be recorded during adjudication, adjudication committees lacked skills and time to do so. Registration was usually made to male household heads, thereby undermining women’s unregistered secondary rights. In Kanyamkago, for instance, only 7% of the plots were registered to women as joint or exclusive right-holders, and 4% to women as exclusive owners (Shipton, 1988). Although some judgements protected non-registered right-holders by giving effect to or creating trusts (e.g. *Muguthu v. Muguthu*⁶), the dominant judicial interpretation is that registration extinguishes all non-registered rights (*Obiero v. Opiyo*; *Esiroyo v. Esiroyo*⁷). Furthermore, in some areas consolidation of fragmented landholdings under the land tenure reform curtailed the relatively independent managerial control that women exercised over the dispersed family plots they cultivated (Fleuret, 1988).

Source: Cotula, 2002.

6. HCCC No. 377/1968.

7. [1972] EA 227 and [1973] EA 388, respectively.

Overall, the legal stratification produced by decades of government interventions have not replaced customary systems, but added new layers, exacerbating the situation of “legal pluralism” and “forum shopping” described in section 1.3. Government interventions in land relations have contributed to change customary systems – though not always in the way expected by policy makers. These issues will be explored more in depth in the three thematic chapters (chapters 3 to 5) and in our case study from the Inner Niger Delta, Mali (chapter 6).

3.CHANGES IN “CUSTOMARY” LAND MANAGEMENT INSTITUTIONS: EVIDENCE FROM WEST AFRICA

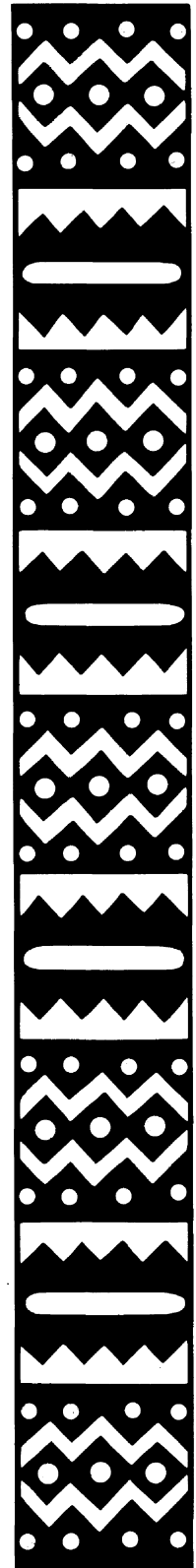
Philippe Lavigne Delville

3.1. INTRODUCTION

For farmers, herders and fishers, access to land and natural resources is governed by rules that determine who can use the resources and under what conditions. These rules are implemented by authorities who make the rules and enforce them, allocate rights and arbitrate conflicts. These authorities (individuals or organisations) are what we call land management institutions. “Customary” institutions are those drawing their legitimacy from “tradition” – although in some cases they are also regulated by legislation.

As noted in chapter 1, the term “customary” is very ambiguous. Here, it is used to describe a system of authority based on anteriority and alliance, in which access to resources depends on social belonging, and the rights are allocated – and sometimes renegotiated – under the auspices of land management institutions (Chauveau, 1998). Current land tenure arrangements can be said to be “customary” in so much as they remain essentially based on these principles (even if important changes may occur in the rules, authorities, or concrete rights held by resource users).

The nature, remit and powers of customary land management institutions vary considerably from place to place. In some cases, they cumulate political powers and land management responsibilities, while in others separate institutions are responsible for land management



and for political decision-making. In some cases customary land management institutions are largely autonomous bodies, while in others they are organised in hierarchical structures headed by “paramount chiefs” and manned by different levels of sub chiefs (e.g. in many parts of Ghana). The extent to which customary institutions are still effective and perceived as legitimate also varies.

As local situations are very different, generalisations need to be avoided. Nevertheless, this chapter aims to identify key trends, drawing on evidence from West Africa. The chapter draws on the fieldwork undertaken within the context of the CLAIMS research programme (see Box 1.1) and on complementary materials from other West African countries such as Senegal, Niger, Ghana and Cameroon.⁸

3.2. POWER OVER PEOPLE, POWER OVER RESOURCES⁹: THE SOCIO-POLITICAL NATURE OF “CUSTOMARY” MANAGEMENT

In customary systems, access to land and resources is an integral part of social relationships. In other words, land tenure is *embedded*¹⁰ in social relationships. Customary systems are alliance-based (Magnant, 1993) and rely on a number of principles (Chauveau, 1998). These usually include primacy of first occupants; access to resources linked to community/lineage membership; relatively easy access to cultivation rights for incomers when land is abundant, but differentiation between “autochthons” and “incomers”; cultivation rights secured through labour and continuous use (see chapter 1).

These principles are implemented and arbitrated by customary authorities whose legitimacy derives from both anteriority of presence (the founders, or those who define themselves as such) and recognition of the magico-religious alliance that they have formed with the local genies on the one hand and with political forces on the other. This gives them *territorial* control and hence, in practice, political power – because it allows them to accept or refuse the settlement of a new household on the land. Such power continues to exist, with more or less significant changes, despite religious change and the demise of the earth rituals that originally underpinned it. Customary land tenure systems are fundamentally of a socio-political nature, and are based on status (nobles/commoners/captives; founders/allies/outside), age (elders/youths) and gender (men/women) factors.

8. Some of the literature comes from papers presented at a workshop on local land administration systems organised by GRET, IRD and LAJP in December 2001.

9. See Chauveau *et al.* (2004).

10. This term used by Polanyi (1944) emphasised the fact that, in non-capitalist societies, the economy is not an autonomous category but functions within social relationships.

Customary institutions intervene in territorial control and in the regulation of settlement via the reception of “foreign” social groups: permission to move in and clear land, and definition of settlement modalities, both of which build the local “community” and organise the population and use of the territory. In addition to the fertility rituals aimed at guaranteeing good harvests and to the allocation of land for clearing, customary institutions administer a more or less sophisticated set of rules governing fishing, farming, gathering and grazing rights. These rules may cover specific resources (e.g. grazing) or organise the use of a territory by different specialised social groups (covering all the resources situated in it).¹¹ They may grant access to resources to certain stakeholders only (residents, members of the founder’s lineage, etc.) and may protect the resources through bans on certain species, religious practices on fish reproduction sites, calendar regulations or authorised periods, and so on. Resources governed by such rules are not, for all that, “common resources” in the strict sense: while use rights are shared within a social group or set of allied social groups, power over the resource (power to make rules and enforce them) is held by a given lineage and exercised by its representative. Rules can also organise the co-existence of overlapping forms of resource use (e.g. on the Inner Niger Delta, see chapter 6).

One function of customary land management institutions is to regulate access to land and resources and thus manage the tension “between land security as an individual good” (that is, the ability to produce and ensure one’s livelihood) and “land security as a common good” (that is, the social reproduction of the group and the capacity of future generations to ensure their livelihood) (Jacob 2005). This allows flexible access to land in lineage holdings for all members (Breusers, 1999).

There are obvious links between controlling people and controlling resources. Yet, these different powers can be separated, in particular when a political or ethnic group conquers a territory. After the conquest, control of land is frequently left to the pre-existing local authorities. This leads to the dissociation of the political chieftaincy and the land chieftaincy. In addition, control of resources can itself be divided among several “masterships” exercised by different authorities: of bush lands, of hunting, of water, etc.

The structure of customary land and resource management institutions, like the powers they exercise, is therefore the product of context-specific political history. Wars, conquests and religious conversions on the one hand, and state policies, technological and demographic change on the other, have historically brought about profound

11. Thus, in the flood recession zones such as the middle Senegal Valley (Boutillier and Schmitz, 1987) or the Inner Niger Delta (see chapter 6), the *leydi* are political areas and agro-fishing-pastoral territories, in which customary institutions organise resource use by various groups (farmers, herders, fishermen).

structural changes. Often, new authorities do not fully replace pre-existing ones, leading to overlapping layers of different authorities (Bierschenk and Olivier de Sardan, 1998). Customary and historical legitimacy is often a matter of historical interpretation. But it was colonisation that brought about the largest changes, by undermining the very logic behind territorial control.

3.2. LEGAL PLURALISM AND COMPETITION/COOPERATION BETWEEN INSTITUTIONS

Colonial and post-independence governments sought to reorganise land access arrangements and local institutions to their own advantage. They passed laws on land and resources based on radically different principles to those characterising customary systems. They sought to re-organise local institutions to ensure control over men and consolidate their territorial hold. As the government did not want to or could not totally replace local institutions, it provided for legal pluralism (the co-existence of systems of rules based on different principles) and made systems of authority and arbitration more complex, raising land governance problems. The relationship between local institutions and the state is at the centre of the discussions on local land management, giving them a fundamentally political dimension.

In French-speaking areas, the colonial power wanted to control local authorities and affirmed its power against them. Political chieftaincies (village or canton) were created where they had not previously existed, regional chieftaincies were remodelled. Laws paid only lip service to customary rights. In English-speaking areas of West Africa, indirect rule left more room for customary authorities. In many cases, the power of local aristocracies was thus considerably strengthened by colonial authorities even when chiefs previously had only limited control over the territory. This has had profound implications for the trajectory of change in local land relations. Even today, in Ghana, the chieftaincies (“stools” and “skins”) have considerable power over land, and use it to claim “ownership” of the land in their territories and the right to sell it in peri-urban areas (Abudulai, 2002).

Tensions between the diverse norms on which “customary” land management is based and those of government interventions (laws, but also how government agents interpret them) creates a situation of *plurality of legal systems* in which different norms embodying contradictory principles coexist (see chapter 1). This plurality of standards (Lund, 2001) also results from economic and social changes that cause certain stakeholders to contest the legitimacy of local norms, and new, more legitimate but not official, practices to emerge. This plurality of norms is matched by a plurality of

institutions: state interventions establish public land management systems (local administration, courts, etc.) over customary systems, partially replacing them and modifying them: development projects often create their own authorities and committees. As a result, numerous institutions (land chiefs, village chiefs or administrative executives, regional customary authorities, religious authorities, local government bodies, judges, various village, inter-village or communal committees, etc.) may claim legitimacy to exercise land management responsibilities. Others play a role in practice: project technicians and even politicians that intervene in land management.

These different institutions have variable power and legitimacy. They are in complex relationships of alliance or competition for arbitration and decisions over land and natural resources. They can be mobilised, regularly or when needed, by parties involved in conflicts. They rely on different norms and are most often neither in defined relationships with each other nor in a hierarchical relationship. Thus, they can give contradictory opinions or rulings without any one prevailing over the others. A conflict arbitrated in one way by one institution may be arbitrated differently by another. Arbitration is based on multiple criteria: recognised rules (that are not necessarily the law for the territorial administration), the position of applicants, their capacity to “thank” the arbitrator, etc. This induces non-predictability in dispute resolution and uncertainty as to the norms that are supposed to apply, and ultimately fosters opportunistic claims and never-resolved and ever re-surfacing conflicts (e.g., on Niger, Lund, 1998).

However, legal pluralism is not necessarily a problem. It allows rights to adapt to changes in economic and power relations. More than the co-existence of different norms per se, it is the splintering of the system of authority and the unregulated plurality of arbitration bodies that is the source of opportunistic behaviours, “forum shopping”, and weak capacity to resolve conflicts. Such competition and rivalry between land management institutions is not seen everywhere. The splintering of systems of authority depends on the intensity of public intervention, the importance of outside stakeholders, the economic stakes, and local socio-political contexts. In many cases, customary norms and authorities remain dominant, government authorities do not interfere, and outside stakeholders are obliged to respect local standards (e.g. on Burkina Faso, Jacob, 2002). In some other places, multiple institutions find ways to cooperate and coordinate, creating hybrid, new regulation frameworks. While legal pluralism is a reality at national level, it may or not have concrete impacts for rural people, depending on history and the local power balance.

3.4. CHANGES IN THE LOCAL LAND REGULATION FRAMEWORK

The management of land rights cannot be analysed from the angle of customary institutions alone. Because of social and political change, and of the intervention of the state and development projects, numerous actors are today involved in local land management. The challenge for an empirical analysis is to understand the complexity of these dynamics. In our analysis of changes affecting customary land management institutions, we use the concept of “local land regulation framework” to capture this diversity of stakeholders. A local land regulation framework can be defined as *the set of public or private, individual or collective institutions that play a role – in law or in practice – in land-related decisions, with their relationships of cooperation or competition*. The decisions may concern the definition and application of rules, the allocation or validation of rights, the registration and administration of rights, conflict resolution, etc. Here, the term “regulation” designates the way in which rules are created, transformed and abrogated, according to lines of confrontation, power relations, negotiation, compromise and coercion.

Land regulation is the result of interactions between, on the one hand, the practices of “powerful” institutions that have the power to influence land decisions, whether in law or in practice, drawing on diverse sources of power and legitimacy; and, on the other, the room for manoeuvre that resource users are able to obtain for themselves. This interaction is shaped by logics of interest and power as well as by values, bodies of rules, and views of what is fair and legitimate. The concept of “local land regulation framework” aims to identify the possible regularities or emerging trends, and to enable the analysis of the results of the – more or less – diverse and partially contradictory bodies of practice; it in no way assumes that practices are coherent, not that customary rules have collapsed, nor that they are still uncontested. It is a conceptual framework which allows for empirical analysis of the changing role of customary land institutions, knowing that these stakeholders, depending on the specific case, are engaged with other institutions in relations ranging between competition and co-operation, and may carry a vision of future generations’ interests or exercise their prerogatives or their power in their own interest.

This concept paves the way for the empirical analysis, in specific contexts, of the local systems of land regulation and of their relationships with the legal framework: What institutions are effectively involved in local land regulation? What role do the authorities who have legal responsibility over land and natural resources play? How are land- and resource-related decisions made? What is the concrete role of customary institutions? How are the various types of institution called upon? Under what conditions and why? What effects do these practices have in terms of conflict resolution or non-resolution? Does

the overall scheme produce a level of regulation or, on the contrary, does it generate or perpetuate tension and conflicts?

Recent research has emphasised resource conflicts and land access dynamics more than it has land management institutions as such.¹² This makes it difficult for a study of this nature to document change intervened in customary institutions. We will try to do this by analysing a few examples from West Africa, which illustrate the great diversity of local situations.

Gwendegu  (Jacob, 2002) is a set of settlement units in the centre-west of Burkina Faso, populated mainly by Nuna “autochthonous” peoples linked by pacts and alliances that are related to the settlement in the 19th century and the conflicts during that period. These autochthons were able to control and limit the arrival of incomers, for whom modes of settlement and access to land remain based on a patron-client relationship between a local and an incomer (“*tutorat*” – see chapter 5). The land is held under customary tenure, with little or no interference from state institutions, which only intervene in problems concerning protected forests.

In this context, customary institutions are very effective in regulating land relations and conflicts within customary territories. There, control over certain rituals, knowledge of buried milestones marking territorial limits, etc. make it possible to examine claims of anteriority and solve conflicts. Problematic conflicts mainly concern the boundaries of these territories – one stake being the ability to settle incomers on the contested lands. These conflicts often go back several decades, there is no overall authority that can arbitrate them. Government officials refuse to get involved and tend to refer parties involved in conflicts to customary mediation. But the competing claims rely on different interpretations of history that can neither be proven or refuted. Thus, it is the ability to impose one’s interpretation of history that determines who will arbitrate and the outcome of the arbitration.

The **old agricultural colonisation zone in western Burkina Faso** (Zongo, 2001) is characterised, on the contrary, by a large state-supported influx of incomers during the 1970s and 1980s, and a massive expansion of cotton farming. Today, demographic growth, the enrichment of some of the incomers (those who have developed commercial activities), and land scarcity have led to growing tensions at a time of generational change. The young autochthonous population and young incomers challenge the agreements made by their parents. The older forms of access to land (settlement, open-ended loans) are increasingly replaced by monetarised rentals (see chapter 5). Land withdrawals followed by rentals — to

12. Note, however, recent work on the links between settlement and control of land and territories (Kuba and Lentz (eds), 2006).

the same or other incomers — allow the autochthonous population to challenge previous arrangements and reaffirm their land rights while receiving income. In this context of rapid change and of growing tensions, local land regulation systems are being put to the test. Customary authorities have proved unable to control and regulate the settlement of incomers, and are being further eroded by that massive influx. On the other hand, government bodies, at village and district level, are increasingly approached by parties to disputes – but seem unable to follow a coherent approach in their response. It would seem that land relationships are in a transitional phase: the spread of monetarised rentals and the growing reliance on government bodies reveal the emergence of new, market-based modes of land regulation. These are likely to further marginalise local customary authorities.

The **Makacoulibantang region of south-eastern Senegal** (Ribot, 1999) is an agro-pastoral zone with a low population density and with valuable timber resources. Charcoal makers from Dakar come here for their supplies. Tensions have emerged over control of the wood resources of village forests. According to forest legislation, the forest resources belong to the state; the government Forest Department defines wood cutting plans without consulting local stakeholders. The charcoal makers, who work for a few large traders in Dakar or Tambacounda, are received by the village chiefs, who receive material benefits in exchange. In 1990, the re-starting of logging caused a strong reaction among local villagers, who attempted to oppose it. For this, they called on the Rural Councils' elected members who in turn called on the prefect of Tambacounda. The latter issued a decree suspending timber exploitation. However, drawing on the law, the Forest Department forced him to reverse his decision. Consultation meetings followed and resulted in a formal — but not respected — agreement not to cut trees in villages that were opposed to it. More than by a ban on wood cutting, the claims of villagers and elected officials were motivated by an attempt to assert the right to control timber exploitation and the profits from the commodity chain: income for inhabitants, taxes for elected officials.

The **Inner Niger Delta, Mali** (see chapter 6), is characterised by a rich ecosystem linked to the flooding of the river and complex exploitation modes combining farming and fishing by different social groups. The customary systems were formalised by the theocratic empire of the *Dina* state in the 19th century, under the political hegemony of herders who controlled access to rich pastures (*bourgoutières*) and collected fees. This political organisation was weakened by droughts, by the emancipation of slaves, and by public intervention that claimed to regulate pastoral practices and that historically favoured farming over pastoralism. The *jowro*, who control pastures, are raising access fees and are competing with local elected officials to organise transhumance and control fees (see chapter 6).

The **Timbi Madina plain in Guinea** (Diop, 2001) is at the heart of the Fouta Djallon, highlands populated by the sedentary Fula. It is a society in which the aristocracy has exclusive control over land; and in which former captives, often located in isolated hamlets, have only use rights over land. The development of potato cropping is increasing land values in the plain and nearby lowlands. Part of the plain was expropriated by the state and used as a pilot state farm under Sékou Touré's regime. There are no customary claims to the land here, and the development project obtained access to land from the prefect in the form of a "loan" to the project beneficiaries. Many former slaves were able to appropriate lowland plots. However, at the end of Sékou Touré's regime, the new Guinean government declared "the restitution to their legitimate owners of the goods that were stolen under the former regime". Some nobles sought to evict their former slaves from the lowlands and even from the *tapades* (intensively cultivated gardens). A conflict over a lowland area between two members of the local elite was resolved by the Rural Development Community's "land mediation commission", with survey, written arbitration report, and transmission to the prefect. Another conflict, between herders who were losing land and a large farmer, was resolved with the intervention of the herders' customary chief.

Northern Cameroon (Ousman *et al.*, 2001) is characterised by the political and land tenure hegemony of the Fula political powers, the *lamido*. These control the plains, that are former pastures now subject to agricultural colonisation by mountain populations. The *lamido's* power was strengthened by a post-independence alliance between the new Cameroonian government authorities, mainly representing the interests of groups from central Cameroon, and the Fula chieftaincies of the North. The local government administration has been captured by the *lamido*, who organise incomers' access to land, grant incomers only precarious use rights, and levy fees upon harvest. Through these fees and other sources of income (e.g. dispute settlement fees), land is one of the *lamido's* principal sources of revenue and remuneration of their "staff". This case illustrates how customary institutions of an essentially feudal nature have managed to maintain and even strengthen their power following colonisation and independence. For all that, while customary dispute settlement predominates, various resource users (herders, incomers from various socio-ethnic and religious groups) turn to different authorities in case of conflict, giving rise to a great variety of situations (in terms of evolution and strength of the local *lamido*, and of his relationship with government authorities).

Tamale (Abudulai, 2002) is the administrative capital and the main economic centre of the Northern Region of Ghana. With the growth of the urban centre, land values in peri-urban areas have soared. Responsibility for regulating urban development lies with the local government authority. However, customary institutions maintain control over land access. Those wishing to secure access to land approach customary chiefs, who gives

TABLE 3.1. EXAMPLES OF LOCAL LAND REGULATION FRAMEWORKS

Case	Comments	Regulation
Gwendegué (Burkina Faso)	No major conflicts inside customary territories. Migrants gain access to land through customary norms (“ <i>tutorat</i> ”). The main conflicts are on limits between different customary territories. Government bodies tend to refer parties to the customary authorities in the case of conflict.	Customary regulation with little government interference
Old Colonisation Zone (Burkina Faso)	De-legitimised and powerless customary authorities, due to a massive and unregulated influx of incomers and a profound restructuring of village land. Rapid expansion of monetarised land relations. Conflict between incomers and autochthons over land access. Resource users turn more and more to the village administrative chief and the government administration.	Transitional crisis between weakened customary regulation and hybrid State regulation
Makacoulibantang (Senegal)	Alliances between the charcoal traders and the Forest Department exploiting the lack of local control over timber resources and buying out the village chiefs. Unsuccessful attempt at an alliance between villagers and local elected officials briefly supported by the government administration, to claim local control over resources or in any case over revenue from the commodity chain.	Conflict between sectoral and decentralised government regulation within the context of eroding customary institutions
Inner Niger delta (Mali)	Resource access and use regulated by the jowro. Weakening of control over land clearing. Growing competition for the position of jowro in a context of rising fees; and between jowro and communes for control of transhumance fees. Numerous conflicts, regulated locally but with increasing reliance on courts.	Weakened customary regulation, competing with regulation by local governments and others
Timbi Madina (Guinea)	Aristocratic society based on control of land. Elected rural community officials primarily coming from the traditional upper class and intervening in land regulation with both sources of legitimacy.	Hierarchical customary regulation capturing local government
Northern Cameroon	Presence of powerful local institutions consolidated through alliances with the central government and through capture of local government. Hegemony over incomers but diversity of recourse in the case of conflicts.	Hierarchical and hegemonic customary regulation with strong social polarisation
Tamale (Ghana)	In a context of urbanisation and soaring peri-urban land values, chiefs sell off common land for personal gain, without consulting their constituents.	Unaccountable customary regulation result in privatistic management of common land and resources
Bonoua (Ivory Coast)	“Invented tradition” and re-emergence of the royalty in a context of land competition with “outsiders” (and sometimes political change), aiming to exclude the “outsiders” from access to the land/economic opportunities. “Legal-rational” formalisation of these new rules by the royalty. Youth or home-town associations play a driving role in these re-compositions. Government support.	Hybrid and conflictual regulation based on re-traditionalisation

“sells”) the land in exchange for money. In selling the land, chiefs tend not to consult the council of elders or the broader community; and to use the revenues for their own personal benefit. In other words, rather than applying “custom”, many chiefs are using their position to redefine the rules of the game to their own advantage. In this process, buyers are usually wealthy groups looking for land for residential or speculation purposes; while poorer community members see their access to land eroded.

Bonoua (Koné, 2001) is a small Abouré village-size kingdom in the south of the Ivory Coast forest region to which numerous migrants have moved. In a context of land saturation and with the cocoa economy in crisis, the young indigenous population, allied with “members” in cities, use “tradition” to re-structure the “outsiders” social and land status in an atmosphere of growing xenophobia linked to the fact that Burkinans, who arrived as plantation labourers, were able to seize the opportunities offered by pineapple growing and are now the “bosses”. With the support of the territorial government (sub-Prefect, rural development sector head), they enact a certain number of local regulations, declaring strict rules on “outsiders”, greatly reducing their access to land and limiting the social relations between the indigenous population and “outsiders”; they use the royal institutions to give them power. The customary clauses on respecting local social norms are used but re-written to justify exclusion from society and land. The registers of tradition and the State (written regulations, the support of the local government) are used and combined by the young and the educated.

3.5. SOME OF THE FACTORS DRIVING CHANGE

In the previous section, we examined how change occurred in customary institutions in a few cases from different parts of West Africa. This revealed the great diversity of local contexts. While in some cases customary land regulation systems have maintained or even consolidated their power and effectiveness, in others they have been undermined by profound changes and/or have lost their legitimacy. We now turn to analysing some of the factors that have fostered this change.

Demographic and economic change

Population growth and integration into market economy and commodity chains are major sources of change for agriculture. However, they do not by themselves lead to a collapse of customary regulation, which can be very effective with high densities and market production (even if the land allocation function of the land institutions may disappear when all the land has been allocated). For example, the Sereer groundnut production area, in Senegal, has been linked to international markets for more than a century. Here, land institutions at village and lineage level still govern land access.

Allocation of cultivation rights between production units is still regulated at lineage level, and there are no land sales (Guigou *et al.*, 1997). However, increasing pressure on land, in a context of democratisation, may lead to restrictions in access to land for incomers and increased politicisation and “ethnicisation” of land access.

State policy

Historically, state policy has played an important role in driving change in customary institutions – both where it relies on them and strengthens their power, and where it seeks to undermine them. In Niger and Ghana, customary institutions have a legally recognised role under land legislation. In Burkina Faso, government regulation cut up “traditional” political arenas and vested land management responsibilities with “village land management committees”, with varying degrees of success (Tallet, 1998).

BOX 3.1. STATE POLICY, LABOUR FORCE AND LAND INSTITUTIONS IN COCOA AREAS: GHANA VS IVORY COAST

Ghana and Ivory Coast have both experienced considerable expansion of cocoa production in forest areas, linked to labour migration. In Ghana, access to land was controlled by traditional authorities, supported by the state: “customary law” is part of the land law and applied by courts (see Box 2.3). While this consolidated the power of customary authorities, the integration of customary norms in the legal system meant that incomers obtained access to land mainly on the basis of local rules and “derived” rights (tenancies and sharecropping). Conflicts are usually regulated in favour of customary tenants. Labour shortages made cocoa production collapse in the 70s.

In Ivory Coast, the increase in production has been greater. It resulted from a deliberate state policy which combined explicit support to labour migration and to land access for incomers, with « *laisser-faire* » in terms of land law. In their attempt to retain some control over the land, customary institutions entered into patron-client arrangements with incomers (*tutorat*; see chapter 5). This led to forum shopping and to the politisation of land issues around identities.

Source: Crook, 2001.

State land policies mainly focused on three issues:

- political control over people and political hegemony on territory, which lead to alliance or to conflict with customary authorities;
- access to land for State projects and urban dwellers (which is one rationale for denying local land rights to rural people);
- control over migration and settlements, for economic and/or political purposes.

Sectoral natural resource policies have also had an impact. State policies have often claimed for a state control over this resources, particularly when there where economic stakes (e.g. forests and wood for timber and fire). In areas where resource use was strongly regulated, public interventions tended to weaken customary institutions and

rules. Thus, in parts of the Sahel, the creation of public grazing lands eroded customary rangeland management centred around control over wells, leading to overgrazing (Vedeld, 1994). The sectoral laws (on pastures, fishing, forests) of the 1990s included participatory forms of resource management. The establishment of local committees to implement these laws is a political and economic stake, which has generated conflict over their control between customary land management institutions, political chieftaincy, and new local elites (e.g. rural wood markets); between water masters and transhumant fishermen (e.g. Niger River fishing committees; Kassibo, 2002), and so on. The various attempts to formalise these committees thus open arenas for competition between them and new or emerging power groups.

The State's capacity to regulate local institutions depends on its local presence and power. State interventions have diverse effects depending on local socio-political configurations. In all cases, they open arenas for manoeuvre, without being able to predict which actors will be able to make the most of them.

Social and political change

Social and political change at the local level can weaken customary institutions: religious conversions that weaken their monopoly over rituals; emergence of new economic powers based on remittances, commercial crops or off-farm employment; pressure to sell resources that overpower bans on such sales; etc. Some new land chiefs returned to the village after a personal trajectory of migration or urban installation and no longer remember local land history.

On the other hand, where strong state-supported migrations took place some decades ago, increased pressure on land and politisation of land issues may lead young autochtons to deny land rights given to migrants, reassert "customary" rights and "retraditionalise" land management, leading to stronger socio-ethnic identities and a more exclusive land management.

The legitimacy of customary institutions, or their capacity to act effectively, can thus evolve in the eyes of local resource users. While locals generally prefer to resolve conflicts "within the belly of the community", according to a Wolof expression (Traoré, 2002), outside stakeholders turn more readily to administrative authorities or courts. Once written documents emerge (in particular for commercial land transactions), rural populations prefer to turn to the administrative village chief, the *préfet* or the mayor, rather than to the land chief, to authenticate contracts (Lavigne Delville, 2003).

Decentralisation processes

In several African countries, decentralisation processes entail the devolution of natural resource management responsibilities to elected local governments (e.g. in Senegal

since 1972, and in numerous countries since the 90s; see Rochegude, 1998). These new authorities therefore potentially compete with customary institutions for the power to manage land or natural resources. Thus, at least in the short term, decentralisation often adds an additional layer to the superposition of institutions with resource management responsibilities, and increases the complexity of local land management. Elected officials are solicited to intervene in conflicts. They seek to control the sources of revenue generated by quarries (Mongbo, 2006), hydro-agricultural equipment, pastoral resources (see Chapter 6), and fisheries (Box 3.1), and by urbanisation (Djiré, 2005), thereby competing with customary institutions.

A strategy adopted by some customary land management institutions to compete in this changed context is to enter the political arena. A *jowro* from the Inner Niger Delta thus said: “I’m afraid of decentralisation, it aims to strip me of all my *jowro* powers and give them to the mayor. To keep my *bourgoutières*,¹³ I entered into politics and, thank God, I was elected mayor. However, I am still worried because most of my *bourgoutières* are in other communes” (quoted by Maiga, 2005: 212).

The result in terms of land management depends on the local balance of power between customary authorities and new leaders, and on how they relate to competition or cooperation.

BOX 3.2. WATER MASTERS, FISHERMEN, FARMERS, AND LOCAL GOVERNMENTS IN LAKE KORIENTZÉ, MALI

When the flooding begins to recede, numerous fishermen set up camps on the shores of Lake Korientzé, a lake connected to the Niger River. They pay fees to the water master, and trade with the Bambara villages that host them. Since 1999, the year the former water master died, a conflict over fishing techniques has set the inhabitants of Gouloumbo against fishermen, the former believing that the latter over-exploit the resource. Behind this issue lies the stake of control over access to the lake, which the Bambara claim to “own”, and even more so over the related fees (over the past few years, the new water master stopped paying part of the fees to the Bambara village chiefs). This conflict is also linked to a conflict with the neighbouring village of Kéréto, that hosts the largest camp of fishermen. The question of “who controls the lake” is made more complex by the creation of the local government in Korientzé: this is in principle responsible for natural resource management, which could legitimise a takeover by elected officials. The inhabitants of Gouloumbo use this argument to strengthen their claim to monopolise control over the lake and to convince the mayor to support them, although he is resisting. A local fishing agreement was indeed signed under the auspices of the municipality in 2000. However, this is not widely perceived as legitimate as it was never truly negotiated.

Source: Lavigne Delville and Hochet, 2005.

Institutional innovation

Finally, one can note institutional innovation by customary institutions seeking to reaffirm their control over territories and resources. In central Benin (Edja, 1997), at the instigation of their urban members, lineage chiefs set up “rational-bureaucratic” land management procedures by attempting to keep a “registry” of their lands and of the settlement of incomers to ensure that income from the land is collected “rationally”. Similarly, in Ghana, several customary chiefs have set up land administration structures to assert their capacity to manage land.

Elsewhere, informal coordination mechanisms between local institutions and state agents have emerged, ensuring regulation of land relations in practice. “In a field characterised by: (i) the procedural logic of (individual and collective) stakeholders; (ii) the absence of a stable and respected legal framework; and (iii) the complexity of land characteristics and use, one can see a double dynamic of innovation through which the stakeholders attempt to: create new rules or institutional arrangements; and stabilise, as well as they can, certain negotiation or arbitration procedures to guarantee them so as to ensure a minimum of predictability in day-to-day action and minimally secure longer-term land rights outside of, or parallel to, the market or rules guaranteed by the public authorities.

This entails interplay between local officials of government bodies (who act according to unofficial standards but do so in the name of the legitimacy enjoyed by state agencies) and locally legitimate private stakeholders. This may produce a certain degree of land security, that combines the two types of legitimacy (state and local).” (Chauveau and Lavigne Delville, 2004).

3.6. CONCLUSION

In most parts of rural West Africa, customary institutions still govern access to land and natural resources. One century of State intervention, market development, population growth, has not led to a collapse of these institutions, except in a few cases. However, this does not mean that these institutions have not evolved. Authorities and/or rules may have changed. It is not possible to examine change in customary land management institutions without looking at the broader context in which they operate – particularly their relationship with other institutions. We have done this by using the concept of “local land regulation framework”. This is “an arena or, rather, an ensemble of arenas within which social stakeholders and political and politico-legal authorities (whether state or not) compete for access to land resources and to control this access” (Le Meur, 2006). There is not the “legality” of state institutions on one hand and the “legitimacy” of customary institutions on the other. Configurations are complex and variable: the latter can lose their

legitimacy, regardless of their real power; and may acquire legal backing from the state. The factors driving change in local land regulation systems (from state policy to local socio-economic and political change) do not affect customary institutions alone but also the interplay and balance of power between these and other institutions. In practice, in contexts of economic and social change and of plurality of institutions and standards, it is not the *a priori* legitimacy or legal prerogatives of an institution, but its effective power that determines whether stakeholders will call on it to manage resources or to arbitrate a conflict. It is political capacity – power – that creates authority and legitimacy (Lund, 2002). This partly explains the diversity of contexts in our examples.

Legal pluralism and the plurality of institutions involved in land regulation can be considered as a long term reality. In a context of deep economic and social changes in rural areas, and of a great diversity within each country, one stake for land policy is to favour the emergence and consolidation of land institutions that bring together legality and legitimacy, and are accountable (Le Roy, 1996). This requires a clear political will in terms of equity and social peace, so as to adapt the legal and formal framework in order to avoid the main discrepancies in land regulation and the main sources of conflict, and to favour accountable bodies.

4. CHANGES IN INTRA-FAMILY LAND RELATIONS

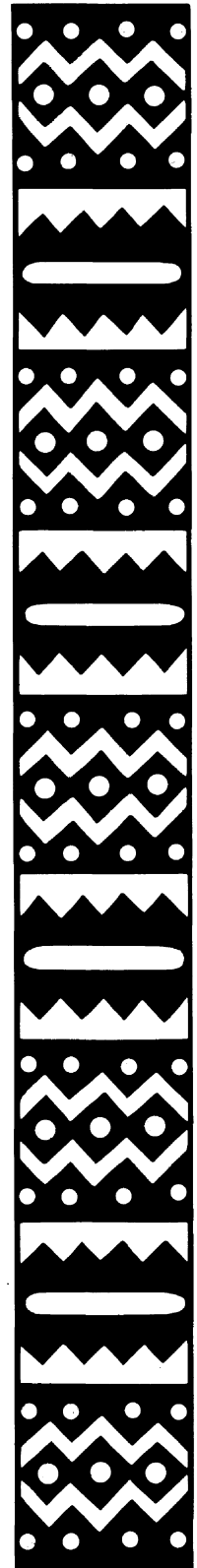
Julian Quan

4.1. INTRODUCTION

Despite a resurgence of academic and policy interest in Africa's customary land tenure systems, the allocation and use of land resources within extended family groups, including the inter-generational dimensions, have received little attention in the last few decades.

The received wisdom dating from the work of Boserup (1965) has been that customary tenure change takes a linear, evolutionary path within which tenure is assumed to become progressively more individualised (for critical analysis of this perspective see Platteau, 1996 and 2000, and Yngstrom, 2002), and in which the farm household is treated as the principal unit of land management. Related to this, from the 1970s onwards, the household unit has also been the dominant unit of analysis in seeking to understand agrarian systems and their economic organisation (Chauveau *et al.*, 2006).

Variants of this evolutionary perspective have come to dominate land policy debate in and about sub-Saharan Africa, and the customary land management rules whereby individuals gain access to land according to their positions within kinship networks and/or land allocations made by customary authorities are widely perceived to have changed, under the influence of demographic growth and market development and other “modernising” trends. Accordingly, the primary job of land policy has been seen to be one of securing emergent, individualised land



rights of households or household members by either hastening the replacement of outmoded customary tenure institutions by forms of private title, or by reforming and adapting customary systems so that they recognise and support the claims of individuals and individual households in an equitable way (Toulmin and Quan, 2000, Platteau, 2000). At the same time, the complex processes through which customary practices have changed and their consequences for those reliant on land access by way of their status within kinship networks have been largely hidden from view.

Anthropological research has questioned the longstanding assumption that within customary tenure systems individual's rights are clearly defined by the individual's place and status within the kinship group revealing instead that land rights are negotiable, that kinship relations can be manipulated by the actors concerned, and that customary institutional rules can be ambiguous, so that individuals' rights to resources pertaining to the group are not given, once and for all (Berry, 1993; Chauveau *et al.*, 2006). These facts suggest that it is primarily intra-family relations which determine land access opportunities and tenure security, setting the parameters within which changes in individual household resource allocation can take place, and providing an essential context to understand the responses of customary tenure systems to the wider drivers of change described in chapter 2 of this study.

The research described here demonstrates that extended family units continue to provide the operative framework within which individuals negotiate rights to land in sub-Saharan Africa's customary tenure systems. Moreover, these systems have been reconstituted and re-interpreted over time as a result of colonial and continuing post-colonial state interventions (including in some anglophone countries the codification of customary law). These have themselves helped solidify the view of households as the operative land management unit, and of male household heads and customary authority figures or chiefs as the dominant land managers, despite the evidence that wider kinship systems remain the basis of customary rights and claims.

Empirical investigations focussing explicitly on intra-family land relations have been limited. However, available work demonstrates that extended family networks provide a diverse array of context-specific and negotiable opportunities for individuals to access land through kinship networks, in addition to the acquisition of land rights by direct inheritance through the male or female line, and by marriage. However, the significance of the wider family as a source of land, and the degree of negotiability of land claims via extended kinship relations also appear to be diminishing. At the same time, the frequency of intra-family conflicts over land is increasing, under the influence of increasing population growth, land competition, urbanisation, market development and the formalisation of land tenure arrangements.

This chapter surveys the available evidence on changing intra-family land relations, and draws some tentative conclusions about overall trends and their significance for the wider changes in customary tenure systems.

4.2. INTRA-FAMILY DIMENSIONS AND TENURE CHANGE IN SUB-SAHARAN AFRICA

Intra-family dimensions of land tenure have been the subject of recent ethnographic research in francophone West Africa. The synthesis of the findings of the CLAIMS research project in Benin, Burkina Faso, Ivory Coast and Mali (Chauveau *et al.*, 2006)¹⁴ (see Box 1.1 on page 9) outlines the key elements of an intra-family perspective, based on the descriptive exploration of the nature of land rights portfolios within individual and extended family land holdings, their regulatory mechanisms, the social interactions around these rights, and strategies used by individuals to establish them. Relying on fieldwork in Kongodjan (southern Ivory Coast), the authors identify differences in both synchrony (not all family members have the same rights) and diachrony (land holdings are passed down to successive generations and new authorities and responsibilities emerge over time). In many contexts, the household itself is not the operative land management unit, and multiple sets of land holdings must be considered. This is because “farms” as economic units, and the broader land management units over which various forms of property rights are exercised, rarely correspond. The historical perspective adopted by these studies focuses on the ways land rights have been distributed and managed by lineages and extended families, whose leaders allocated land and granted derived rights in the interests of the land holding group, while the institutions of chieftaincy became responsible for territorial integration across the wider group or clan, maintaining direct management of specific areas of land, but also establishing group policies concerning, for instance, in-migration, labour and production systems, usually including prohibitions on the permanent alienation of land outside the group.

Chauveau *et al.* (2006) describe how the content and scope of individuals’ rights varies according to status within the family group (determined by age, gender and proximity to family heads or founding lineage members), with lower status members having rights of more limited scope. Family heads and higher status individuals with land management rights and responsibilities have regard for various considerations in allocating and restricting land rights, including group income generation; moral responsibilities for

14. Chapter 3 of Chauveau *et al.* (2006) is a synthesis prepared by Jean-Pierre Jacob with Jean-Pierre Chauveau and Jean-Philippe Colin and provides a key background document to this chapter.

younger family members to begin farm work; precautionary aversion to irreversible transactions (e.g. the lending or leasing out of land for plantations of perennial crops such as cocoa and oil palm); and understandings of land availability, according to community demands and levels of control ceded to derived rights holders from outside the group by various types of land transaction.¹⁵

Although the precise details of the intra-family relationships described in this work may well be specific to the communities and regions of West Africa researched, the operative status of extended family relations in determining the changing character of land rights is confirmed by a variety of anglophone anthropological research in East and southern Africa (MacKenzie, 1993, on Kenya; Yngstrom, 2002, on Tanzania; Peters, 1995 and 2002, on Malawi) as well as in Ghana (Amanor, 2006; Berry, 2003). Although these studies have not focused explicitly on intra-family dimensions, they have adopted long-range historical perspectives, whereby changes in intra-family dimensions of customary tenure can be discerned. Interestingly, they also focus on historical changes in economic, demographic, policy and institutional contexts, which induce changing priorities and restrictions in land allocation and management decisions.

Below we outline and illustrate the findings of both anglophone and francophone research into the changing intra-family dynamics of customary tenure, focussing on two central dimensions: gendered and generational land relations.

4.3. GENDER AND INTRA-FAMILY LAND RELATIONS

A large policy and rights based literature identifies the principal intra-family issues as those of women's land access and tenure security within the household and land allocations systems dominated by male traditional leaders.¹⁶ Arising from this perspective is a substantial gendered critique of the dominant strands of contemporary land policy, including the discriminatory character of formal land law and institutions (see for example Manji, 2003; Tripp, 2003; Walker, 2002a and 2003; and Rangan *et al.*, 2002 on South Africa); the ambiguity of women's position under customary tenure, which provides them with land access as a form of social security but leaves them extremely vulnerable in that their access to kin groups is determined primarily by marriage (Walker, 2002a); and the consequent risks of interventions to institutionalise customary authority over land, given

15. Sharecropping arrangements are seen as retaining greater control for the landholding family than rental arrangements which themselves retain greater control than the relationship of *tutorat* (the term used in Ivory Coast for the patron-client relationship whereby a land holder provides land to assist an outsider in becoming established and eventually joining the community and establishing secure property rights – see chapter 5).

16. See for example numerous papers from Human Rights Watch at www.planetwire.org and various papers focusing on women's land rights in sub-Saharan African countries available through www.oxfam.org/what_we_do/issues/livelihoods/landrights/

the essentially patriarchal character of customary land relations (Whitehead and Tsikata, 2006; on Tanzania, Tsikata, 2003; and Yngstrom, 2002).

Thus, for example, in Kenya, the land titling and adjudication process excluded women, undermining their security on plots to which they formerly held secure use rights, and their access to credit was curtailed because lenders required land ownership as collateral (Walker, 2002a; Quan, 2000). In this context, the changing balance of relations between the patrilineal sub-clan and individual clan members conditioned by colonial agricultural development have led to privatised, male ownership of land, disadvantaging women (Whitehead and Tsikata, 2003, citing MacKenzie, 1993). The passage of Uganda's 1998 Land Act promoting the registration of customary land rights involved the unexplained removal at a late stage in the drafting process of an agreed and widely supported clause requiring joint spousal rights in land (Walker, 2002a; Adoko, 2000). Land redistribution in Zimbabwe prioritised male household heads, and widowed or divorced women were often forced to move out of resettlement schemes (Walker, 2002a, citing Jacobs, 1999). Despite the validity of this critical focus on land policy, anthropological and historical investigation into changing customary tenure practices in different parts of the continent reveals however that the dynamics are more complex.

A number of writers remind us that gender relations refer not only to relations between husbands and wives but embrace wider kin and non-kin networks (Walker, 2002; Peters, 1995), and that "...the conjugal unit needs to be understood in the context of wider sets of relationships among groups organised in the basis of descent and the gender ideologies implied therein" (Yngstrom, 2002). Women's relations to the land and their opportunities as producers require that they be seen not only as wives, but also as sisters, daughters, in-laws, widows and divorced and separated women. It is their status in all of these roles, in relation to both parental and marital kin, which determines their land access and tenure security.

Women's land rights and tenure status depend primarily on their dual identities as sisters in their families of origin and wives in their families by marriage. This is exemplified by the West African groups observed by Chauveau *et al.* (2006), which accord women land rights on two apparently contradictory principles: not granting women very secure rights because they will eventually marry out of the group, leaving family land vulnerable to acquisition by other families; and concerns to grant women full status as members of their original (patrilineal) descent group, by providing secure use rights.

According to Yngstrom (2002), women can be considered to hold primary and often strong land use rights because of this latter principle, which recognises the centrality of

women's roles in production and social reproduction. It is the conventional, linear evolutionary perspective on land tenure which makes implicit assumptions about gender: women's rights are not universally "secondary" to men's or necessarily replaced by private rights controlled by men, as the tenure system (supposedly) evolves. "Married women experience tenure insecurity as wives in some historical contexts but not in others" because their use rights are frequently very secure in view of husbands' social obligations to ensure that women are able to feed themselves and their children. Moreover, the strength of the rights of women to access land and transmit access across generations may be underestimated by focusing exclusively on the allocative power of male household and family heads, to the neglect of the social context in which these powers are exercised. Women gain rights through marriage not only through their husbands, but also by joining extended family networks; and may in some cases be able to enforce these rights by recourse to the husband's lineage even if the husband himself is unwilling to provide land (Yngstrom, 2002).

Nevertheless, kinship obligations, and therefore intra-family gender relations are susceptible to change over time. Chauveau *et al.* (2006) identify two key processes which transform the ways in which women gain access to land, supported by observations of various different groups and localities in Mali and Ivory Coast. Firstly, the effects of the commodification of land create opportunities for male relatives to gain by land sales, obliging women to defend land claims through judicial means or by appeal to customary authorities, or to seek alternatives, such as an NGO facilitated land borrowing scheme observed in one Malian case. Second, demographic pressures leading to land scarcity leave women's livelihood options dependent on remaining land availability or their abilities to generate alternative incomes. Where families have no economic opportunities outside of agriculture, the needs of family heads and men tend to be prioritised, and it is not uncommon for women to find women relinquishing use rights and taking up agri-processing and trade activities.

Platteau (2004) discusses how the social security functions of lineage-based tenure systems have become eroded under demographic and economic change, and the growing incidence of exclusionary practices which develop as land scarcity and increasing economic value transform customary tenure systems. Foremost amongst these are restrictions on single women's opportunities to access land¹⁷: for instance, brothers-in-law may harass widows whose use rights to ex-husbands' land (and her interests in bequeathing those rights to her children) conflict with the claims of the marital kin-group on the family land asset. At the same time, land scarcity within a

17. Other changes identified by Platteau in the paper cited include the gradual disappearance of village commons, their diminishing roles as fall back options for the poor, and the increasing individualisation of land tenure rights, all of which tend to impact negatively on lower status and vulnerable groups.

woman's natal kin-group can make fathers or brothers reluctant to accept the return of separated or widowed women to the group. These circumstances lead both to growing social and marital tensions within in-law families, and to high frequencies of destitution and urban migration amongst single women, divorced, separated, widowed and unwed mothers (Abraham *et al.*, 1998).

A different perspective, also rooted in empirical observation of women's experience, is that the new political and productive systems following the advent of colonialism have upset the gendered power relations that dominate customary land management systems; this has led to new opportunities for women to access land by challenging traditional gender contracts, for instance in Botswana (Kalabamu, 2006). In addition, recent land policies and legislation in a number of African countries promote autonomous land rights for women, and seek to provide avenues for registration of land rights by women, although this often conflicts with customary norms. In other cases, such as amongst matrilineal groups in Ghana, women have proved perfectly able to utilise their positions within kinship networks to negotiate secure land rights and play active roles in commercial agricultural production, despite countervailing tendencies which limit land allocations from men to women (Aryeetey, 2002).

4.4. YOUTH AND INTER-GENERATIONAL LAND ISSUES

The relative land access and tenure security status of different generations in sub-Saharan Africa is emerging as a critical issue as populations grow and land scarcity increases. The position of youth is widely believed to be one of disinterest in land-based livelihoods, particularly where education and access to off-farm and urban wage labour opportunities are available. However, limitations in young people's access to land, land concentration, and land sales and allocations outside of the kin group by older generations can become highly problematic where alternative livelihoods are not available, and can trigger wider social conflicts.

A number of anthropological investigations have considered questions of land access for youth from the perspective of cross generational dynamics within wider kinship systems. The research in West Africa by Chauveau *et al.* (2006) identifies the main aspects of inter-generational land relations. First, different generations of the same family do not strictly speaking succeed each other, but rather overlap, so that members of different generations are contemporaries belonging to different status groups for at least part of their lives. There are inherent tensions in this situation, especially if, for example owing to land scarcity, younger generations do not accept decisions taken by elders as regards the distribution of land.

The second dimension is that of the rules and practices for transmission of land rights between generations, which vary from group to group and may also change over time. The groups observed exhibited a number of inheritance patterns: through the indirect line, in which inheritance from the eldest to the youngest brother before passing to the next generation (eldest son of the eldest brother); through primogeniture, where inheritance passes from the eldest to the next eldest in the lineage group, regardless of their position in generational succession (usually justified by reference to the labour invested in the land by elders when they were younger, from which today's youth now benefit); and finally, in the less frequent cases where family land coincided more closely with household operated land units, from father to eldest son, possibly also involving sub-division of the land amongst other family members. These findings illustrate the extent to which the inheritance practices of land holding families, rather than transmission from parent to child, still condition land access arrangements for younger family members, in many cases obliging them to borrow or rent land from inside or outside the family group. Although synthetic studies of these types of inheritance practices in other regions of Africa are not available, ethnographic studies do indicate that similar patterns exist, and may also hold true for matrilineal groups (where inheritance passes through the female line, either from maternal brothers to a mother's children, or in some cases directly from mother to daughter).

The third and most complex set of inter-generational issues described by Chauveau *et al.* (2006) concerns changes in internal family land management arrangements over time, and the effects this can have on local societies as a whole in the context of wider demographic and economic change. The transmission of rights between generations also entails a renewal of authority and decision making arrangements at the head of family land management units, through which succeeding generations can re-examine the distribution of land rights within the family, and land allocations which may have been made with outsiders.

These may involve the progressive individualisation of land holding units, breaking up the wider unity which older generations sought to maintain – a separation of economic farming units by inheriting sons or brothers described by Chauveau *et al.* (2006) for Burkina Faso, and by daughters and sisters described by Peters (2002) for matrilineal areas in southern Malawi. In some contexts, overt challenges by the new generation can arise to land loans, rentals or even sales transacted by the elder generation of land managers. The nature and impacts of these changes are complex because although the demands of younger generations may be driven by land scarcity, simultaneous tendencies of urban economic growth and increasing movement between urban and rural areas mean that agricultural land plays a more

marginal role in many people's livelihoods. The erosion of the social security functions of land at the level of wider kin groups, together with increases in its monetary value, appear to result in land being treated as a more individualised asset by younger generations, over which they may seek more exclusive control, either for farming within the household, or for revenue generation through sales and other transactions.

These changes may involve intergenerational conflicts with broader social and political dimensions, in which whole cadres of youth can come to challenge the status quo as regards land access, in particular where older generations are perceived to have tied up land in their own interests, for instance through sales and rentals to outsiders, and insufficient land is now available for the new generations to work. Various investigators have identified a wave of disputes western Burkina Faso, and throughout Ivory Coast as new generations have come to power. However circumstances can vary from situations in which different generational actors have distinct and contested interpretations of how land management norms and rules ought to operate, to cases where a more robust family moral economy maintains overall stability despite conflicting intergenerational interests in land (Chauveau *et al.*, 2006).

The complexity of intergenerational land issues, involving the erosion of the intra-familial social security function of land, rising land values and increasing individualisation of decision making within land owning families, and linked to risks of inter-generational and inter-group conflict are well illustrated by Amanor (2006) discussing the development of Ghana's cocoa frontier during the 20th century (see Box 4.1).

BOX 4.1. CHANGING INTERGENERATIONAL LAND RIGHTS AND THE DEVELOPMENT OF HIGH VALUE TREE CROPS IN GHANA

In the 1920s, increasing labour migration to Ghana's cocoa belt facilitated rapid alienation of land and accumulation of cocoa plantations. This involved the development of expansionary farm enterprises, whereby young men were deployed to convert forest into cocoa plantations in expanding frontier districts, their efforts rewarded by gifts or future inheritances of cocoa farms, and supplemented where required by hired migrant labour and share tenancies. A situation of land hunger arose amongst local populations who could no longer expand onto uncultivated land. As land became increasingly scarce, the close kin of both migrating and local groups began to compete for land. By the 1950s, women were no longer able to obtain land as gifts (the established way of transferring land to non-matrilineal relatives, amongst the matrilineal Akan) from their husbands. Studies in the 1970s indicate that the land claims of wives and children who had helped to establish cocoa plantations were usurped by matrilin, in cases where the husband had not made a

formal gift of land before his death. Similarly, nephews of maternal uncles, having helped to establish plantations, could find themselves displaced by the uncle's junior brothers. In response to this situation, the youth gradually withdrew their labour from their family's farms, but lacked alternative incomes and ways in to the farm economy, due to competition from migrant wage labourers and sharecrop tenants, whom the older generation used to work the farms, and who accepted lower remuneration. Growing resentments between local youth and migrant labour ensued, and by 1969, this led to politically organised expulsions of migrants, associated with the decline in expanding cocoa frontier and a slump across the cocoa sector, affecting Ghana's whole economy. Subsequently, local youth began to replace migrant labour as farm labourers and sharecroppers, but with shortfalls of labour, and low cocoa prices produced returns insufficient to support the costs of re-establishing old cocoa plantations. With rising costs and limited access to either migrant or family labour, farmers were forced to let out more and more land to sharecroppers. Share contracts from the matrilineage (obtained on more favourable terms than on the open market) rather than land gifts or inheritance became more important as a means of land access for the children of indigenous families, also serving the interest of the elders, who sought to protect the value of their investments by maintaining the land under cocoa, and avoiding conversion to food crops.

As the cocoa frontier has become exhausted new opportunities emerged. The creation of the Ghana Oil Palm Development Corporation in 1975 involved the expropriation of around 7000 farmers from 9,000 ha of land in Akyem Abuakwa area, creating a dispossessed class of labourers. This created opportunities for land owners to expand oil palm operations using hired labour, or via share contracts, but once again, the children of land owning families are forced to negotiate sharecropping contract with their kinsfolk, in competition with outsiders, instead of being able to access land freely. The transactions costs (payment for drinks and a witness fee to seal the transaction) of sharecropping contracts have now increased enormously and are no longer affordable by poorer people, creating great uncertainty for the youth of indigenous families, as elders seek to maximise their own incomes from land transactions and maintain control of valuable plantation land. In effect these are ongoing processes of social differentiation which contribute to the consolidation of an emergent stratum of middle income farmers, at the cost of social exclusion, but which are largely invisible since the process takes place within the structures of land holding families and lineages.

Source: Amanor (2006).

Under conditions of extreme population pressure, a marked intergenerational dimension to land conflicts has been identified and linked to the development of civil and ethnic conflict in Rwanda (André and Platteau, 1998). Here, land distribution remained relatively equal until the 1980s. In large area of the country, owing to population densities and land pressure, land ceased to be managed by extended kinship networks, and to provide a social security function beyond the immediate household (see Box 4.2).

BOX 4.2. LAND AND INTERGENERATIONAL CONFLICTS IN RWANDA

Data collected by André and Platteau (1998) presents a picture of informal land purchases of very small plots as the main mode of land acquisition in the very high population density Gisenyi area of Northwest Rwanda, whereas land inheritance and gifting remained more common elsewhere. This land market had a disequalising effect in terms of land distribution, and was comprised largely of distress sales. The data also showed growing inequalities in land ownership, with households headed by older persons having much more land per household member than those headed by younger people, together with a rising incidence of absolute poverty associated with quasi-landlessness and absence of off-farm income, a situation in which many younger households became trapped. For them, land access became severely constrained not only because of distress sales, but also as a result of the loss of customary rights of access afforded by the wider kin-group.

The study area suffered from a very high frequency of disputes, the greater part of these related to land access, and principally inheritance, seriously threatening social stability. Vulnerable groups were disempowered by the operation of the land market, as customary obligations to make available lineage land to destitute kinsfolk ceased to apply to land acquired through the market, which more and more land was. In addition, customary rules relating to access to lineage land became defined and enforced in more restrictive ways as land became increasingly scarce, excluding groups such as divorced women and the children of non-customary unions (increasingly common as the poor could not afford the payment of bride price) who might previously have benefited from some degree of security.

The most socially disruptive land disputes however were those between fathers and sons. Under patrilineal succession eldest sons received land with the responsibilities of ensuring land access for junior family members. With growing scarcity this practice fell away, and equal subdivision of land amongst all the sons became the norm. Disputes arose because of resentments by elder sons, particularly in situations where lineage land had become depleted as a result of sales. Sons also disputed the retention of land by fathers and challenged the legitimacy of transactions transferring land use outside of the family. Traditional arrangements whereby youngest sons would care for elderly parents in return of an additional parcel of land also became eroded, as did the gifting of land to daughters. Divisive tendencies emerged for the stronger elements of families to consolidate land holdings, excluding weaker family members. The social consequences of these changes were most severe amongst poorer families, fuelling resentment amongst the younger generation, and contributing to the emergence of intra-family violence and uncontrollable groups of delinquent landless youth. André and Platteau identify these circumstances as fertile ground for the development of the catastrophic and politically manipulated generalised ethnic violence, which was also found to have been directed in part at the older generation and those who had acquired substantial land holdings through the market.

Source: André and Platteau (1998).

4.5. CONCLUSIONS: CONTINUITY AND CHANGE IN KINSHIP-BASED LAND MANAGEMENT

Intra-family analysis and empirical study has revealed that extended families continue to play important albeit changing roles as land management units; and that within these units, the principles of social stability and the moral economy of the lineage group can offer relatively secure land rights to women. These findings are in contrast to more conventional views which identify the household as the predominant land management and economic unit and focus on women's relations with their husbands as the basis of gender relations. Moreover, tenure management through extended kinship networks is not evolving in any simplistic or linear sort of way towards more nuclear family structures as has frequently been supposed.

However, the land transactions and institutional practices embedded within kinship networks are themselves susceptible to change as a result not only of population growth and land scarcity, but also because of wider economic and institutional development processes, so that the opportunities for family members to negotiate land claims are not determined by purely endogenous factors. As a result, processes of land privatisation (by customary elites and powerful individuals) and individuation of land holdings, as responses to demographic change, rising commercial demands for land, and urban growth, as well as the opportunities created by land policy, are very real. As a result, land management decisions may be taken more and more on an individual or household basis.

Under conditions of population pressure and land scarcity in southern Malawi, pervasive conflicts over land are central to the division of matrilineal families between sisters' daughters and also between sisters, whereby former family members are redefined as outsiders who do not belong on the family's land (Peters, 2002). This sort of process underlies longer term processes of social differentiation and class formation, and Peters argues that wider processes, including market liberalisation, commodification of land and globalised economic change impose limits on the negotiability of land rights within extended kinship systems (Peters, 2004).

In addition to these processes, state intervention to change and incorporate customary tenure rules into formal law and institutional practice has undoubtedly shifted the terrain within which customary rights are negotiated, and these changes continue today. These reforms tend to limit the extent to which new sets of land laws and institutions recognise the legitimacy of the land claims negotiated within the wider kin group, by favouring the claims of certain individuals such as spouses, immediate family members or tenants with land use contracts with the original owner, by privileging them in law and creating

opportunities to validate their claims through the courts or through formally recognised land management institutions (even where these may be considered to be “customary” in nature). This may result in individualisation and de facto privatisation of land rights and exclusion of vulnerable groups as people utilise formal as well as customary processes to safeguard their claims (see for instance Odgaard, 2002, discussing Tanzania).

Empirical findings in relation to changing intra-family land relations and their drivers tend to point towards a progressive, but by no means linear individualisation of decision making around land, embedded in changing kinship relations, within which lineages, families and individuals gradually tend to consolidate property rights, and customary norms tend to shift to enable this to happen. In the cases discussed here, from West, East and southern Africa, population growth and market development leading to increasingly monetised land transfers (or “commodification” of land relations) are key drivers of change. Within these processes, women’s land rights and access opportunities, while not always secondary in practice, become more vulnerable, especially for those less powerful within lineage groups and land holding families, and generally, in patrilineal succession systems. Thus, despite the continuity of kinship based land management, realities of intra-family tenure change in Africa may not be far from situations widely reported – that customary tenure systems are becoming more individualised and women’s tenure status is becoming more insecure. In addition, land access opportunities for younger generations are becoming more limited, and the changes which occur are very much affected by historical patterns of migration, changing relations between different social groups, and the changing economic opportunities available to land owning groups and the outsiders with whom they transact land rights. Moreover, the changes in the behaviour of extended kin groups as land management units, and the squeezing of opportunities for women, youth and specific vulnerable categories of people are exacerbated by the disruptive impacts of HIV/AIDS, conflict, climatic change and instability on the stability of kinship-based social networks. Whilst these may be general tendencies, there is immense diversity of evolving customary practice and changing economic and institutional context, within which intra-family change is embedded.

5. CHANGES IN LAND TRANSFER MECHANISMS: EVIDENCE FROM WEST AFRICA

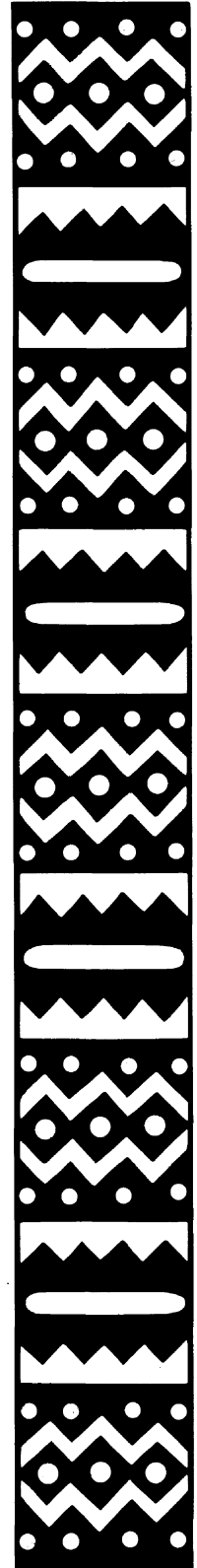
Jean-Pierre Chauveau and Jean-Philippe Colin

5.1. INTRODUCTION

This chapter studies changes in institutional arrangements for the transfer of land rights, both between groups and between individuals. It draws on research findings from the CLAIMS programme, which involved fieldwork in four West African countries: Benin, Burkina Faso, Ivory Coast and Mali (see Box 1.1, page 9). The research (2002-2005) focused on a small number of field sites from different ecological and socio-economic contexts: an area of central Benin currently being settled for agriculture; an area in south western Burkina Faso experiencing high levels of immigration and one in central-western Burkina Faso still relatively unaffected by immigration (Gwendégué); an “old-frontier”, plantation-economy area in central western Ivory Coast; and a former “no man’s land” in lower Ivory Coast. Complementary work was undertaken in a series of secondary sites. Box 5.1 at the end of this chapter lists the key fieldwork reports on which this chapter draws.¹⁸

Mechanisms for the transfer of land rights range from short-term to permanent transfers, from partial to complete transfers, and from non-monetarised arrangements embedded in social relations to market transactions. This chapter documents both changes in “customary”, non-

18. For a more extensive summary of the CLAIMS research findings on land transfers, see Chauveau *et al.* (2006), on which this chapter is based. Fieldwork in Ivory Coast was disrupted but not entirely prevented by the civil war there.



monetarised arrangements (namely the “*tutorat*” relationship); and the emergence of monetarised transactions, particularly land sales. While, conceptually, clear differences exist between “*tutorat*” arrangements (in which land transfers are embedded within a broader socio-political relationship and entail a continuing duty of gratitude and of allegiance toward the customary land holders) and sales (which are monetarised deals that do not entail a continuing relationship once the transaction is completed), in practice boundaries may be blurred, as *tutorat* arrangements are becoming monetarised and market transactions are nonetheless embedded in social relations.

In most “customary” land tenure systems in Africa, restrictions applied (and often continue to apply) to the transfer of land rights. The “bundle of rights” over a piece of land (right to access lands, to cultivate it, to exclude others, to transfer land rights, etc) is held by a range of different actors. While “operational” rights (access, use, etc) may be vested with small family units (households or individuals), “management” rights (e.g. the right to transfer) are usually vested in the larger landholding group. In this context, the emergence of market transfers is explained in the literature through the so-called “evolutionary theory of land rights” (see chapter 2).

According to this theory, the emergence of individualised and transferable land rights is the result of the changing balance between the expected benefits of establishing such rights and the cost of excluding others from using the resource. The combined effects of demographic growth, development of cash crops and changes in cropping systems (development of perennial plantations, disappearance of mobile cropping systems, shorter fallow periods), the theory goes, increase the value of land and spontaneously lead to greater individualisation of land rights. This entails a concentration of the bundle of rights, including the right to transfer, in the hands of a single right holder. This translates into increasingly monetarised access to land through sales and rental. A sequential evolution is thus established between the consolidation of the bundle of rights into the hands of a single actor and the commercialisation of these rights: the appearance of market transfers would follow on from the bundle of rights being opened up, once all the other elements of tenure individualisation are firmly established (Boserup, 1965; Platteau, 1992 and 2000; Colin and Ayouz, 2006).

However, our research findings show that the picture is often more complex than this theory seems to suggest. On the one hand, the emergence of land transactions, and of land “sales” in particular, does not necessarily operate according to the linear dynamic suggested by this model. On the other hand, even where monetarised transactions do replace “customary”, non-monetarised arrangements, they remain embedded in complex systems of social relations.

Overall, a trend towards the monetarisation of land transactions emerges in the four countries – whether in the form of changes in customary “*tutorat*” relations or of emergence of new forms of land transfers such as sales. These changes are taking place within the context of profound changes in agrarian systems and socio-political relations. In the forested regions of Ivory Coast, for instance, village communities were drawn into the market economy with the spread of coffee and cocoa into their cropping systems from the late 1940s onwards. As a result, demand for land increased considerably, from both autochthonous villagers and incomers attracted by the potential profits to be made from plantations. Unlike subsistence crops, coffee and cocoa shrubs last for several decades, occupying land that acquires growing market value over the years. In these areas, land relations became more individualised and monetarised as land tenure regimes changed in order to accommodate the waves of incomers, continuous land use over long growing cycles of 20 to 40 years and the economic stakes involved in land access.

Similarly, in southwestern Burkina Faso, the social and agrarian context has much changed between 1960 and 2000: in demographic terms, due to the mass migration of Mossi groups from the central plateau towards the South West; in terms of land use and agricultural techniques, due to the expansion of cultivated lands for cotton production (replacing subsistence crops) and greater use of animal traction; and, more recently, due to the influx of returnees fleeing the crisis in Ivory Coast. As a result of these changes, where land used to be abundant, it is now in short supply. This has led to large numbers of monetarised land transactions and to increased conflict over land access (Bologo, 2005; Bonnet-Bontemps, 2005; Mathieu *et al.*, 2004; Mathieu, 2005).

The chapter is structured in two parts. The first one discusses changes in “*tutorat*” relations, highlighting the growing monetarisation of these “customary” arrangements and yet their continuing embeddedness in socio-political relations. The second part discusses the emergence of market transactions, challenging some of the assumptions of the “evolutionary” theory of land rights and highlighting how market transfers are also embedded in broader social relations.

5.2. CHANGES IN *TUTORAT* RELATIONS

The transfer of land rights under customary “*tutorat*” arrangements is a widespread agrarian practice in rural West African societies. It was traditionally rooted in broader patron-client and socio-political relationships, and it was backed by a religious dimension. It first emerged in contexts where land was abundant and population sparse, as a means to attract people to farm the land. However, population pressure has in many areas radically changed that context. Emphasis has shifted from the need to secure availability

of labour to the need to secure access to land. The institution of the *tutorat* has profoundly evolved as a result of this shift. In addition, the *tutorat* has much changed as a result of migratory flows, the monetarisation of land transfers, individualisation of land rights and state intervention. The customary principles underpinning the *tutorat* are being challenged, and are increasingly associated with conflict between and within communities.

The term “*tutorat*” refers to the relationship that develops when an incomer (or group of incomers) and his (their) family are received into a local community for an unlimited period of time, which may span several generations. The *tutorat* entails a transfer of land rights from a customary landholder, who is either an autochthon or someone who holds some prior right over the land (referred to as the *tuteur*), to the incomer. This land tenure dimension of *tutorat* is inextricably linked to its broader socio-political dimension. Incomers are given access to land to provide for their subsistence needs, but their settlement is conditional upon the social order of the community being maintained. As a social institution, *tutorat* regulates both the integration of incomers into the host community and the transfer of land rights to them (Chauveau *et al.*, 2004; Chauveau, 2005 and 2006; Jacob, 2003 and 2004).

The bundle of land rights transferred through *tutorat* arrangements includes use rights (e.g. the right to cultivate), but also management rights (e.g. the right to define others’ rights), so that incomers (individual or group) can deal with developments in the reproductive cycle of their own domestic group (by allocating use rights within the family, and to other incomers provided that this is authorised by the *tuteur*). However, the incomer cannot permanently transfer the land assigned to him nor, *a fortiori*, sell it.

Within this relationship, the *tuteur* is obliged to secure the rights transferred to the incomer vis-à-vis other right holders within the family or village. He is also responsible for “socialising” the incomer and bringing him into line if he fails to fulfil his duties. The incomer thus acquires a specified status within the community. For his part, he and his successors have a moral duty of gratitude to the *tuteur* and, more broadly, to his community, particularly the obligation to work hard there and help it prosper (Chauveau, 2006; Jacob, 2004). This obligation entails the provision of different types of services, which reflect the subordinate nature of the incomer’s status and the continuing subordination of transferred rights to eminent customary ownership rights.

Growing individualisation and monetarisation of *tutorat* relations

Tutorat relations include a variety of diverse arrangements – from collective arrangements between villages (e.g. in parts of Burkina Faso and Mali) to more individualised relations between a *tuteur* and an incomer and his family. In some areas,

an evolution has taken place, with formerly collective arrangements giving way to individualised relations where village or family authorities have less say. In Benin and Ivory Coast, for instance, the individualisation of *tutorat* relations is such that young men can “settle” incomers with little or no involvement of the family. In Ivory Coast, unlike Benin, this process is still disguised. A trend towards greater individualisation of *tutorat* relations has also been reported in south western Burkina Faso. The spread of individualised *tutorat* suggests that this customary institution is in a transitional phase, with land relations becoming more individualised and dissociated from the socio-political aspects of *tutorat*.

These changes are mainly driven by three factors: the monetarisation of the economy, changes in family structures and relations, and state interventions. In particular, the individualisation of *tutorat* is often associated with the commercialisation of agricultural production, and the emergence of cash crops (coffee and cocoa in Ivory Coast, cotton in Mali and Burkina Faso, commercialised food crops in Benin and cashew in Burkina Faso). Among these, production systems based on perennial export crops (coffee, cocoa) most encourage the individualisation of *tutorat*. This is due to the long biological cycle of the trees. Differently to most *tutorat* arrangements, those concerning these crops usually involve the transfer of tree planting rights from the outset of the relationship, and of transmission (i.e. inheritance) and transfer rights.

Such individualisation of *tutorat* is accompanied by pressure from the *tuteurs* to increase and monetarise the incomers’ “duty of gratitude”, particularly in Benin and in the forested regions of Ivory Coast. Where pressure on land is high, *tutorat* relationships may even be replaced by short-term rental agreements (e.g. in the forested regions of Ivory Coast, where incomers who had already cultivated all their land reserves ask their *tuteurs* to rent them additional land for food crops). Individualisation and monetarisation have resulted in the emergence of brokers who mediate between migrants and customary landholders, particularly in Benin, where *tutorat* is individualised, but also in Mali, where it is not.

This context has also resulted in increasing uncertainty about the duration of the relationship established by the *tutorat*. For instance, inheritance of the rights arising from the *tutorat* is no longer automatic, as it used to be under “customary” norms. In the forested regions of Ivory Coast, the death of the original incomer or of the original *tuteur* is often the occasion to renegotiate the conditions of the transfer. Furthermore, it is no longer unusual for land to be “withdrawn” from longstanding incomers – and not merely on the grounds that they failed to respect their duty of gratitude or because the *tuteur*’s heirs need the land. Much of the land withdrawn in western Burkina Faso is transferred to new incomers with greater financial means through disguised “sales”.

Individualisation and monetarisation have also resulted in growing differentiation between “old” and “new” incomers in terms of protection for their rights. Contrary to one of the essential principles of *tutorat*, this differentiation does not always work in favour of longstanding incomers, who may be seen as having benefited from the advantageous conditions of earlier transfers (such as payment of purely symbolic fees). It may favour recent incomers who may be in a better position to make financial payments or provide subsequent assistance to the *tuteur*. In Burkina Faso, recent incomers find it easier to obtain tree planting rights.

In addition to the monetarisation of the economy, *tutorat* arrangements have been affected by changes in family structures and in intra-family land relations – both in incomer and in autochthonous groups. Increased pressure on land and greater monetarisation have fostered the segmentation of collective landholdings and led smaller family units within autochthonous groups to demand greater control over their land vis-à-vis the larger group to which they belong. This has had repercussions on rights to transfer land outside the family or community. Individuals or smaller family groups tend to dissociate their direct financial advantages of transferring land rights to incomers from the disadvantages that these transfers have for the broader community as a whole. Thus, tensions between *tuteurs* and their incomers can be exacerbated by disputes *within* autochthonous families and communities over the transfer of rights (tensions between *tuteurs* and other rights holders in the family, and between these other rights holders and incomers). This is particularly the case in the forested regions of Ivory Coast. Here, villagers (mainly young men) that have failed to make their way in town are returning to the village and claiming access to family lands that have been given to incomers (evidence from Benin, Burkina Faso, Ivory Coast).

Finally, the evolution of *tutorat* cannot be dissociated from the intended or unintended consequences of state interventions to encourage rural migration – either to move people into zones of greater agricultural potential, such as the forested regions of Ivory Coast, or to decongest the most deprived regions with high population densities, like the Mossi plateau in Burkina Faso. Other state interventions also affected *tutorat* relations. For example, legislation vesting land ownership with the state and conditioning protection of land use rights to productive use ended up undermining the customary land rights of the *tuteurs*. Such diverse state interventions led many incomers to believe that a coherent policy to protect their land claims vis-à-vis their *tuteurs* existed. This was the case among the Mossi in the settlement zones of Burkina Faso, and among the Baoulé in the forested settlement zone in Ivory Coast. Within this context, the monetarised and increased “duty of gratitude” contributed to spread the perception among incomers protected by the administration that transfers could be assimilated to a “hire-purchase agreement”, that progressively extinguished their moral obligations toward their *tuteurs*.

In Ivory Coast, these policy efforts to attract incomers from neighbouring Sahelian countries lasted until the 1980s, when they gave way to a critical reappraisal of such policy. In the forested regions of Ivory Coast, the generous conditions for the reception of migrants previously imposed by the government authorities have now been called into question with the advent of a new generation of *tuteurs* and migrants and with increased pressure on land. The heirs of long-established *tuteurs* now openly claim the right to impose new fees, while incomers invoke several arguments to support their cause: the weakening – and even disappearance – of their moral obligations to their *tuteurs*, given the accumulated services rendered over time; their land use rights protected by the principle of productive land use (“*mise en valeur*”), enshrined in national legislation; and, if they are Ivorian, the principle, much quoted by government agents, that land belongs to the state and therefore to all Ivorians. The Land Law of 1998, restricting private land ownership to nationals, fuelled these claims.

The continuing collective and socio-political dimension of *tutorat*

Monetisation of production systems, changes in land relations within the family and state interventions have all contributed to the dissociation of the land tenure and socio-political components of *tutorat*, and promoted the individualisation and monetisation of the land tenure component. This process is most marked where these different factors combine, as in Ivory Coast. Does this mean that the collective and socio-political dimension of *tutorat* is disappearing, ultimately to be replaced with individualised market transactions unencumbered by any interpersonal relationship? Evidence from our sites shows that this is not the case.

Where the individualisation of *tutorat* is most obvious – in western and south western Ivory Coast and in central Benin – there has been a simultaneous reactivation of the collective dimension of such land transfers – although in different forms compared to the past. In Ouessè (Benin), a system of incomer fees was introduced in the 1990s as customary chiefdoms returned to the forefront following the democratic transition. This mechanism, a hybrid between ground rent and a special tax, coexists with the system of individualised *tutorat*, and presents similarities with the more centralised forms of *tutorat* of the past.

In western Ivory Coast, the individualisation and monetisation of *tutorat* relationships has provoked a reaction from right holders within family groups, particularly young men and people living outside the village. These are trying not only to recover the land their elders gave to incomers, but also to claim a share of the “income from *tutorat*” to date monopolised by the elders. Their arguments centre around incomers’ failure to fulfil their moral and socio-political obligations to family and village communities; around incomers not investing in the land or participating in the development of the

community; around incomers' apparent economic success, which is seen as showing a lack of respect for the autochthonous social order that generously received them; around incomers not respecting local customs, particularly Muslims who bury their dead in the bush and do not contribute to funeral expenses; and around the fact that incomers' economic power allows them to corrupt village chiefs and family heads, to the detriment of the traditional religious and land authorities. In many parts of Ivory Coast, these claims and associated attempts to withdraw land have fuelled tensions between autochthons and incomers, as well as within autochthonous groups.

The reactivation of the collective and socio-political dimension of transfers extends beyond the village context and often leads to a resurgence of the collective ideology of indigenusness. This phenomenon associates the feeling of land dispossession in the face of growing numbers of incomers with the fear of losing the social and political prerogatives that go with belonging to the group of first occupants. This fear is exacerbated by its resonance with policy issues at the national level, to the extent of encouraging the ethnicisation and politicisation of incomers' access to land, and consequently, of the institution of *tutorat* itself.

The "indigenisation" of land issues is not linked only to the customary authorities. It is also encouraged by local politicians and government officials originating from autochthonous communities, who are concerned about the influence of the "incomer" electorate at the polls. This is happening in both Burkina Faso and Ivory Coast, where the controversy surrounding the excessively generous reception of incomers has been running for some time and is at the forefront of the political debate.

Previous state policies and interventions that encouraged rural migration and weakened customary land rights have also contributed to the resurgence of the ideology of indigenusness and the politicisation of *tutorat*. The feeling among autochthonous communities that they are being dispossessed of their land is coupled with strong resentment towards government policy, which is seen as the maker of this dispossession.

Ivory Coast is certainly the country where the state has contributed most to the politicisation of the institution of *tutorat*. By enforcing agricultural settlement in the forested regions of western Ivory Coast from the 1960s onwards, and by relying on local arrangements to do this under the cover of *tutorat*, the Ivorian government made *tutorat* a multiplex institution that not only regulated the relationships between *tuteurs*, local communities and incomers, but also intervened in the relationships between village authorities and the state and in the power relations within autochthonous communities (between family groups, and between the young and the elderly)

(Chauveau and Bobo, 2003; Chauveau, 2005). Although the 1998 Land Law and its provision excluding non-nationals from land ownership has yet to be implemented, the announcement and anticipation of its enforcement have stimulated a strong ideology of indigenusness in the forested regions of western Ivory Coast. But land withdrawal claims by autochthonous youths affect the bulk of the land transferred to allochthons – irrespective of their nationality (Chauveau, 2006b).

To sum up

In our field sites in Benin, Burkina Faso, Ivory Coast and Mali, a transition from collective *tutorat* to more individualised *tutorat* is paralleled by a reactivation of the collective dimensions of *tutorat*, by various forms of re-centralisation of control over incomers, and/or by a strong resurgence of the ideology of indigenusness. Individualisation of the land tenure dimension of *tutorat* does not eradicate the collective and socio-political dimension of integrating incomers, but adds another layer to the process. In this sense, the evolution of *tutorat* arrangements does not fully confirm the evolutionary theory of land rights. Despite the individualisation of the land tenure dimension of *tutorat* relations, their underlying collective and socio-political dimension shows the persistency of the “rural” social order, where land not only has a productive function, but also acts as a social catalyst drawing everyone who lives off it into the same moral community. The persistence of this social order can be attributed to the way in which African rural communities are constituted, and the fact that the combined effects of history and politics have ruled out any alternative options.

5.3. THE EMERGENCE OF LAND “SALES”

Evidence from our field sites suggest the emergence, to a greater or lesser degree, of monetarised land transfers across the four countries. In the forested regions of Ivory Coast, for instance, the emergence of market transactions is associated with the long history of immigration driven by the local cash crop economy. Here, incomers have gained access to land by acquiring cultivation rights on woodland or cleared land, but also by “buying” this type of land or purchasing plantations from incomers leaving the region. Land transactions developed between incomers and autochthons, and then between incomers (particularly when they returned to their village of origin) – but not, or very marginally, between autochthons. In this context, the functioning of the land “market” cannot be dissociated from the *tutorat* relationship between incomers and autochthons (Colin and Ayouz, 2006; Koné *et al.*, 2005).

In Burkina Faso, the monetarisation of land transfers is particularly acute in the Comoé Province (departments of Niangoloko, Sidéradougou and Mangodara), which was

unaffected by immigration until recently. This province constitutes a new frontier zone fed by both internal incomers (from the old cotton zone and the North) and “returnees” from Ivory Coast settling outside their region of origin on their return to Burkina Faso (Dabiré and Zongo, 2005). This mass migration led to a radical modification of the conditions of access to land, which swiftly passed from traditional arrangements for integrating migrants (*tutorat*) to monetarised forms of access to land (“sales”). These range from payment of the “customary prices” (sums of money as the equivalent of customary considerations) to sums charged according to the size of the land transferred (Dabiré and Zongo, 2005).

Parallel to the development of these “sales” is the emergence of written documents to secure the transaction. In Burkina Faso, for instance, “sales” are formalised through papers that have no legal value, but which are becoming a ubiquitous instrument in local land transactions. They come in various forms, ranging from short local receipts signed in the presence of witnesses, which record the names and identity card references of the parties involved in the transaction, the size of the land transferred and the price paid for it; to the *procès verbaux de palabre* (PVP) – written minutes of discussions held in the presence of a government official, which records the terms of the agreement. The latter is the form of documentation usually preferred by wealthier and more educated groups such as urban elites. In addition to the information recorded on receipts, the PVP specifies the rights and obligations of each party, with the location, boundaries and size of the land determined by technical agents (Dabiré and Zongo, 2005).

The emergence of land markets is often chaotic and riddled with tensions. In Burkina Faso, the economic opportunities offered by receiving and settling incomers is a source of conflict between autochthonous lineage groups and families, for instance over boundaries. In the past, village lands were divided between autochthonous lineage groups, and land could only be given to incomers by the chiefs of these groups. Nowadays, some actors are selling family lands without the knowledge of the elders, and even assigning land that does not belong to their family or selling the same plot to several actors. Young men seeking social recognition challenge the authority of their elders through unauthorised settlement of incomers and increasingly open opposition to land sales. Conflicts over the installation of incomers outside the boundaries of village lands are in fact attempts to reassert land claims, which may be undermined by mismatches between landholding boundaries and administrative borders. Monetarisation also generates conflict between longstanding migrants and newcomers, as the latter can offer landlords a better deal and are therefore settled on land already granted to the former through traditional means (Dabiré and Zongo, 2005; Bologo, 2005; Mathieu, 2005).

“Sales” of land?

The fact that access to land has become monetarised does not necessarily signal the emergence of a real land sale market. First, the nature and implications of these transfers are open to different interpretations. What exactly is being purchased – the land itself, or the right to cultivate it, with the expiry date implicitly determined by the length of the crop’s growing cycle? Are the transferred entitlements limited to the buyer alone, or can they be further transferred? These ambiguities are particularly problematic when one generation succeeds another, since the heirs of the original seller frequently challenge the nature of the rights acquired by the purchasers or their heirs. While autochthonous “sellers” very rarely recognise the transaction as a sale, purchasers’ attitudes differ according to their place of origin, date of arrival and the links between them and their autochthonous host. In south western Ivory Coast, for instance, the Baoulé consider land transfers to be purchases. They therefore do not observe the moral and financial obligations usually associated with customary land transfers (*tutorat*). Conversely, groups such as the Malinké and Burkinabé (especially the Mossi) tend to continue the interpersonal relationship entailed in the *tutorat* system (Koné *et al.*, 2005).

Secondly, the social embeddedness of monetarised transactions within the institution of *tutorat* means that many sales cannot be considered as full in the sense of entirely freeing the purchaser from their obligations toward the seller. Incomers traditionally gained access to land within the framework of an established system of obligations that tied them to their hosts and imposed a “duty of gratitude” on them. Sales may in fact result in this duty of gratitude becoming more onerous and monetarised as the relational dimension of the transfer persists, at least in the eyes of the person transferring the land. Rather than ending the relationship, monetarised payment may establish or perpetuate it. Thus, exchange of money does not reveal the conclusion of a definitive and incontestable sale. Sellers continue to solicit services from the purchaser long after the transaction, and they continue to request loans (which may never be repaid), and other contributions towards major expenses such as funerals or medical care (e.g., on Ivory Coast, Colin and Ayouz, 2006).

Comparative analysis of an atypical case from a former “no man’s land” in Ivory Coast allows us to test this view that the pre-existing *tutorat* relationships render the commodification of land “imperfect”. Because this study site (the village of Djimini-Koffikro, in the sub-prefecture of Adiaké) involved a former no-man’s land, no *tutorat* relations existed, and land transactions were not socially rooted in relationships between autochthonous and incomer actors. This neutralises a major constraint to the “perfect” commodification of land. Here, land transactions (which affected one third of the total area of village lands between 1950 and 2004) may be described as full sales. Once the transaction is effected, the purchaser is absolved from all obligations towards the seller.

The transaction entails a transfer of the whole bundle of rights over the land (Colin and Ayouz, 2006).

In Burkina Faso, while rural land has been “sold” for fifteen years in the Houet province, and more recently in the provinces of Comoé and Kéné Dougou, such transactions are usually still ambiguous and concealed (Mathieu *et al.*, 2004; Mathieu, 2005). On the one hand, the nature of the rights exchanged is far from clear, and agreed by all parties. On the other, the transactions are still often concealed and rarely accompanied by legal proof of transfer or of the purchaser’s ownership. And, land is still rarely thought or publicly spoken of as a commodity. While these transactions seem to be more common and visible nowadays, they are still far from being considered publicly acceptable or legitimate. We can therefore talk of a market that is emerging but as yet unmentionable (at least in public), since its practices violate customary principles of land tenure and land legislation as understood at the local level (Mathieu *et al.*, 2004; Mathieu, 2005 on Burkina Faso; see also Bonnet, 2005; and Dabiré and Zongo, 2005).

Evolutionary theory and emergence of land markets

In many of the contexts outlined above, the model proposed by the evolutionary theory of land rights is broadly followed. Population pressures and land scarcity have led to greater individualisation of land rights, which in turn have resulted in the commodification of land relations and market transfers. In Mali, for instance, the sequential relationship between greater individualisation of the bundle of rights and the commodification of these rights is widely confirmed, as is the relationship between demographic pressure (mainly caused by migration) and the emergence of sales. The economic liberalisation that began following the coup of 1968 and resulted in the increasing monetarisation of social relationships was also a major factor in the commodification of land in peri-urban areas (Djiré, 2004). In Burkina Faso too, the relationship between demographic pressure (due to the influx of incomers) and commodification has also been verified (Dabiré and Zongo, 2005).

In other cases, however, the picture seems more complex. In western and south-western Ivory Coast, for instance, socially embedded land “sales” have emerged without there necessarily being strong population pressure or full individualisation of land rights. Here, land transfers took place without population pressures partly as a result of state policies. The government’s slogan “land to the tiller” and the stance of the local government administration reinforced the position of incomers (particularly the Baoulé, but also the Burkinabé) vis-à-vis attempts by autochthons to collect land fees. Fearing that they would lose control over their land without compensation, many autochthons in western and south-western Ivory Coast engaged in increasing numbers of market transfers. While ambiguous in their content, these transfers succeeded in providing some cash to the

autochthons, and were seen by the autochthons as ways to reinforce their claims to a status of *tuteur*. In other words, the very fact of being able to transfer land rights to an incomer constituted an assertion of eminent claims over that land. In this context, market transactions do not correspond to a full and final transfer of firmly established ownership rights from autochthons to incomers. On the contrary, they are an attempt to secure a right over the land transferred, and to obtain recognition for it by establishing a sort of *néo-tutorat* relationship (Colin and Ayouz, 2006).

Another common perception that needs to be qualified is the idea that, once a land market has emerged, it continues to operate indefinitely. The case of Djimini-Koffikro in Ivory Coast (Colin and Ayouz, 2006) shows a process of involution in the land market – a market that has been active but which has largely subsided. Here, plots acquired on the market, which are the individual property of the purchaser, tend to be transformed into family property when the purchaser dies. This transmission of land as one generation succeeds another helps explain the almost total closure of the land market over the last two decades, after a very busy period between 1965 and 1975. Nearly one in two sales in the area were concluded in those ten years, which largely correspond to the period when the planters who arrived between 1930 and the Second World War returned to their village of origin. For a frontier farmer, the decision to sell land, acquired through his own labour in a region with no pre-existing customary land rights, was an entirely personal matter. Once the land is inherited, however, any decision to sell is a matter for the family council. Land sales have largely halted due to the growing perception that land in the area is becoming increasingly scarce; to the introduction of new cash crops (palm oil, hevea and pineapple) to replace aging coffee and cocoa plantations in Djimini; and to the limited employment opportunities outside agriculture for family members with rights of use over the family holding. The fact that a heightened perception of pressure on land leads to a reining in of land sales clearly runs counter to the theory of property rights that sees this pressure as a factor promoting the commercialisation of land relations.

5.4. CONCLUSION

Research from Benin, Burkina Faso, Ivory Coast and Mali has documented ongoing changes in the institutional arrangements used to transfer land rights – both between groups and between individuals. These changes are taking place in a context of increased competition over land, monetarisation of the economy, changes in family relations and decades of government interventions. “Customary” arrangements such as the *tutorat* are being reinterpreted and renegotiated, and have acquired a monetary dimension that they did not have before; and new arrangements (“sales”) are emerging in many parts of West Africa, bringing about new practices such as use of witnesses and of written contracts. The

arrangements produced by these changes (whether forms of *néo-tutorat* or market transactions) remain deeply embedded in complex social and political relations. The commercialisation of land access and the continuing socio-political dimensions of land relations constitute two seemingly contradictory but parallel and coexisting processes.

BOX 5.1. FIELDWORK REPORTS ON WHICH THIS CHAPTER IS BASED

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6. A CASE STUDY: CHANGES IN “CUSTOMARY” RESOURCE TENURE SYSTEMS IN THE INNER NIGER DELTA, MALI¹⁹

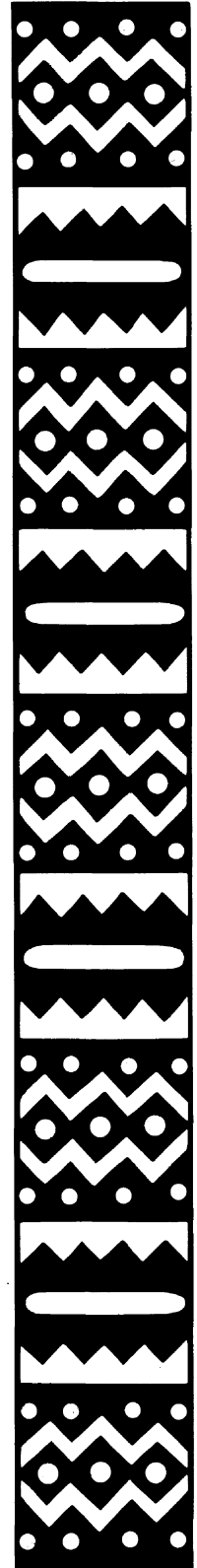
Lorenzo Cotula and Salmana Cissé

6.1. INTRODUCTION

While the previous chapters had a thematic focus and drew on a range of experiences from different parts of Africa, this chapter focuses on a case study from the Inner Niger Delta, Mali. It discusses changes in customary systems for managing grazing and agricultural lands in the delta. In so doing, it cuts across the thematic issues dealt with in the previous chapters.

The chapter is based on fieldwork jointly undertaken by the authors in early 2006. It also draws on the extensive work of the second author, who has devoted much of his professional life to this issue; on a literature review undertaken by the first author; and on research reports generated by a previous IIED programme (“Pastoral Land Tenure and Decentralisation in Mali” – see Box 1.1; Cissé, 2001 and 2002; Maiga and Touré, 2001; and Cissé and Konaté, 2003). Fieldwork entailed semi-structured interviews with customary chiefs, government officials, mayors, natural resource users and other local actors (officials from national and international development agencies, lawyers, civil society organisations, etc.). It also entailed the collection of documents from

19. A more developed version of this chapter is published in 52 *Journal of Legal Pluralism*, pp. 1-29. We would like to express our gratitude to the Journal editor for allowing us to include the chapter in this study, and to the anonymous reviewer for the useful comments provided.



government agencies and other sources (e.g. demographic data, court decisions, local agreements for national resource management). Fieldwork mainly covered five communes from the Inner Niger Delta: Dialloubé, Konna, Ouro Ali, Sio and Youwarou.

The main reasons underlying the choice of the Inner Niger Delta for a study on the evolution of customary tenure systems are twofold. Firstly, the site is of great interest because it hosts particularly valuable natural resources and complex systems of overlapping rights and competing resource uses – as explained in the next section. Because of these specificities (namely the complex articulation between land, water and grazing resource use), the focus here is broadened from purely land to resource tenure. Secondly, customary systems in the area have been studied for decades, which facilitates the analysis of changes over time. In particular, these customary systems were documented in the 1960s (Gallais, 1967). And, in the 1990s, the area drew substantial attention from national and international researchers (Vedeld, 1994; Moorehead, 1997 and 1998; Turner, 1999). International interest seems to have subsided over the past few years. However, the establishment of rural communes in 1999-2000 has affected resource management dynamics in the area. Since then, issues concerning the tensions between customary and statutory institutions have been explored by “grey literature” documents, including those generated by previous IIED action-research programmes (see above) – but not much in internationally available publications.

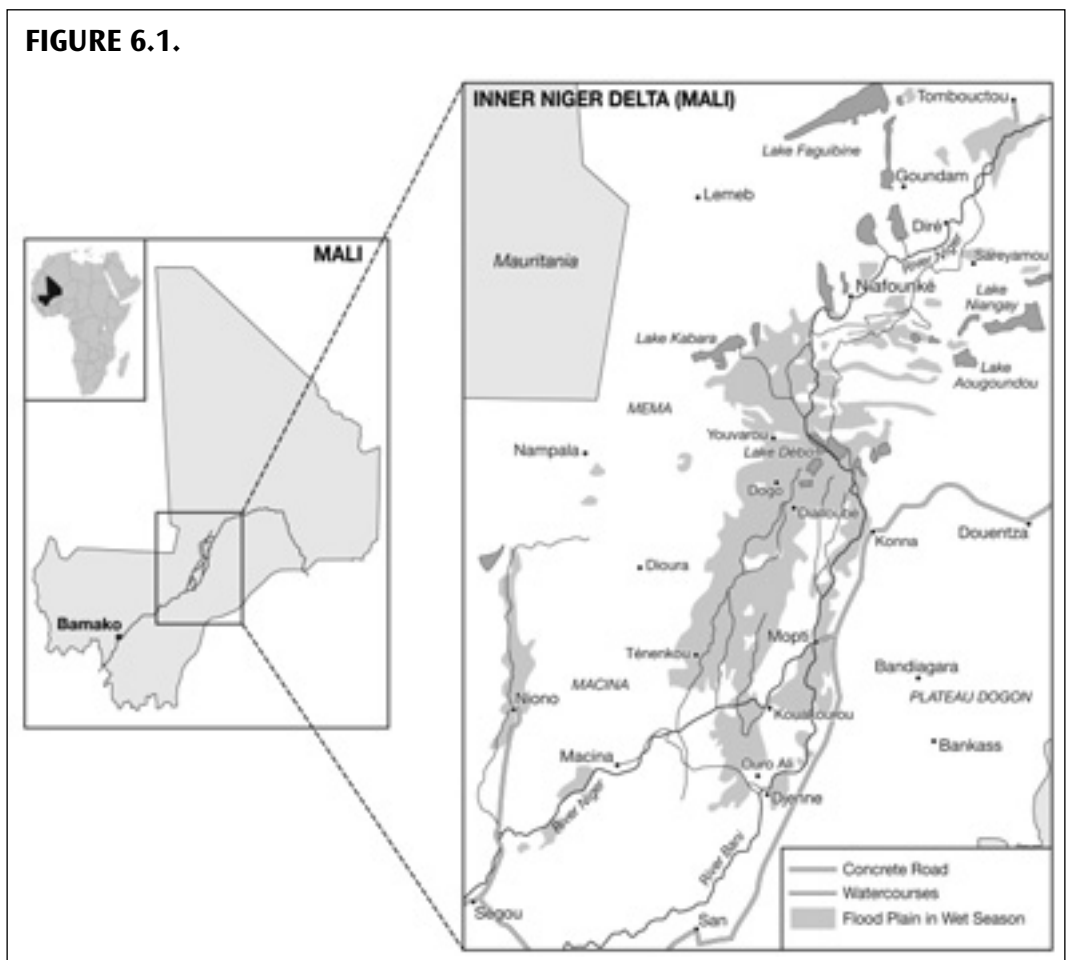
6.2. THE INNER NIGER DELTA: AN EVOLVING ECOLOGICAL AND SOCIO-ECONOMIC CONTEXT

The Inner Niger Delta mainly covers the districts (“*cercles*”) of Mopti, Djenné, Tenenkou and Youwarou, all in the Mopti region of Mali.²⁰ This is an area of national and international strategic importance. It is the largest inland wetland in West Africa, supporting exceptionally diverse, rich and complex ecosystems. The annual floods bring up to 25,000 to 30,000 km² of “extra” land into production (Moorehead, 1998). The delta hosts considerable wildlife resources, and is protected as a listed area under the 1971 Ramsar Convention on Wetlands of International Importance. The delta also contains rich agricultural land, and the highly nutritious dry-season pasture commonly known as *burgu* (*Echinochloa stagnina*). It contains some 70% of irrigable land in Mali, and during the dry season it hosts some 50% of the national livestock; fisheries in the delta support the livelihoods of some 300,000 people (CILSS, 2005). In addition to supporting rural livelihoods, the delta supports the livelihoods of urban groups (traders, government officials, etc), who invest much of their savings in livestock.

20. The seasonally flooded part of Tenenkou is also known as the Macina.

Ecology and livelihoods in the delta are shaped by seasonal cycles. During the hot dry season (April to June), water only runs in the river beds of the Niger and Bani rivers, and of their tributaries. During the rainy season (June to September), water rises and spills over the flood plains. Between October and January, a vast area of land is covered by water. The size of this area varies constantly from year to year, depending on rainfall – both in the area and, more importantly, upstream. In the cold dry season (January to March), waters subside progressively along a southwest to northwest transect, with water staying longer around the lakes Debo and Walado in the northwest of the delta. At the end of the dry season, water has retreated into the river beds and floodplains revert to dusty lands (Moorehead, 1998; see map at Figure 6.1).

The delta hosts three main livelihood activities: farming, herding and fishing. These activities coexist over the same territory, and are combined in a range of production





Satellite view of the Inner Niger Delta in Mali. Because of its fertile land, relative water abundance and valuable grazing resources, the Delta is vital for farmers, fishers and herders. Credit: Provided by the SeaWiFS Project, NASA/Goddard Space Flight Center, and ORBIMAGE.

systems (farmers, agro-pastoralists, fishers, farmer fishers, transhumant herders) (Moorehead, 1997). Farming mainly concerns millet on sandy soils and rice in seasonally flooded areas (Moorehead, 1997). Fishers include local groups and transhumant groups following the seasonal floodings. Herding is practiced by local groups and by transhumant pastoralists, who move from dryland areas (sometimes hundreds of kilometres away, in Mauritania and Burkina Faso) to the delta to spend here the dry season (November to May; Moorehead, 1997). Every year, transhumant herders enter the delta from identified crossings posts (the main ones being Diafarabé and Sofara, respectively southwest and southeast of the delta) and generally move northeast along the delta, following the flood retreat.

Because of this complex system of overlapping resource uses, the delta has been for a long time a crossroads of different ethnic groups and cultures. Historically dominated by the Fulani herders (Fulbé), the delta is also inhabited by the Bozo and the Somono

(traditionally fishers), who first occupied the area, the Bambara (farmers), and other groups. The Rimaibé are the descendents of slaves captured by the Fulani. Slavery was abolished by the French colonisers in 1906.

The complexity of resource use patterns and of ethnic composition is reflected in the mosaic of resource tenure systems that coexist over the same territory – not only customary and statutory systems, deriving their legitimacy on “tradition” and on legislation, respectively; but also different customary systems, ranging from those based on the right of the first occupants (Bozo and Somono agro-fishers) to the sophisticated *Dina* system established in the 19th century by the Fulani. In this sense, legal pluralism is not just the product of colonisation, but preceded it (Vedeld, 1994).

Over the past fifty years, the delta has witnessed major ecological and socio-economic change. While rainfalls present substantial fluctuations between years, they have tended to decrease over the past fifty years (CILSS, 2005). Drops by up to a third in rainfall have been documented for instance in Mopti (for the period 1920-1989; Moorehead, 1997) and in Madiama, a commune located in the Djenné district (for the period 1950-200; Moore, 2005). Major droughts took place in the 1970s and 1980s. This decrease in rainfall has in turn led to a reduction of the flooded area, and to a shortening of the duration of floodings (Moorehead, 1997; CILSS, 2005). This data is reflected in the perceptions of several people we spoke with during our fieldwork, who reported reductions in rainfalls and floodings. Some have claimed that, in addition to decreasing rainfalls, reductions in floodings may be linked to the damming of the River Niger for irrigation and hydropower purposes.

At the same time, the delta has experienced substantial demographic growth. A comparison between the 1964, 1976 and 1998 censuses shows this.²¹ Between 1964 and 1998, the population residing in the Mopti region as a whole increased from 910,713²² to 1,478,505. In the same period, population has grown in all of the Delta districts (e.g. from 131,288 to 263,551 in the Mopti district, and from 84,414 to 155,551 in the Djenné district) and in most of the villages we visited (e.g. from 2,151 to 3,710 in Djalloubé, from 3,094 to 3,993 in Konna, and from 1,962 to 2,785 in Senossa, a village in the commune of Ouro Ali) (GREM, 1964; and MEF, 2001). Such demographic change is due not only to high birth rates but also to the immigration of groups from the surrounding areas, particularly the Seno, the Gourma and the Haire.

21. Such comparison is made difficult by the different administrative levels for which demographic data are presented (village, *arrondissement* and *cercle* for the 1964 and 1976 censuses; communes and *cercles* for the 1998 census); and by the many changes in administrative boundaries. In addition, while the censuses capture change in the resident population, they do not necessarily reflect changes in the overall resource user population, which includes large numbers of non-resident (transhumant) fishers and herders.

22. This included 158,227 from a *cercle* now attached to a different region.



The flood plains during the dry season. After the rainy season, this land area is flooded and used for fishing and rice farming. Lorenzo Cotula, 2006.

The delta has also witnessed important changes in the economy and society. These include the monetarisation of the local economy, the growing fragmentation of the extended family, and a shift in power from the traditional aristocracy, which reflects the interests of Fulani herders, in favour of agriculture (backed by the government) and of “purchasing power”, i.e. the power deriving from access to financial resources. The latter has enabled urban elites (traders, government officials, etc) to purchase large numbers of cattle and, in some cases, to rent out or even buy land for their exclusive use. These and other socio-economic changes will be discussed in greater detail below.

6.3. POLITICAL AND INSTITUTIONAL CHANGE IN THE DELTA

Historically, Fulbé pastoralists have dominated the land use patterns and tenure rules governing resources in the delta. Arriving in successive waves from the 13th century onwards, they gradually spread throughout the delta, carving out areas over which

they controlled access to pastures. Initially, resource access was regulated by warrior chiefs (*ardo*), who governed the seasonal movement of livestock in response to the pattern of flooding. During the flood period, rights to exploit the area belonged to the fishers and farmers; but once the waters receded, the *ardo* controlled the timing and pattern of the clan's grazing regime as well as the conditions of access for outsiders' herds. Over time, a more complex pasture management system developed, with the *ardo* delegating responsibility for the management of pasture land to the *diom-ouro* ("head of the encampment"), or *jowro*. The *ardo* could dismiss the *jowro* working under their supervision; in some cases, this gave rise to tensions between the *ardo* and the local population (Gallais, 1967; Moorehead, 1998).

In the 19th century, Sekou Amadou, also of Fulbé descent, conquered the delta and established a theocratic state (the *Dina*). The *Dina* defeated the *ardo*, sedentarised the delta's pastoralists and formalised the repartition of the delta's pastoral resources into 37 territories (*leydi*). Each *leydi* was managed by a *jowro*. Having abolished the *ardo*, the *Dina* reinforced the position of the *jowro* as the only authority for the management of pastoral resources within their *leydi*. The *Dina* organised the pastoral system according to a coherent – though geographically diverse – set of rules, with the *jowro* regulating the seasonal movement of livestock in and out of the delta. For herders belonging to clans based in the delta, access to pastures was free of charge and based on reciprocity. However, the *Dina* regulated the priority order according to which local herders would access pastures. Usually, first came the herd of the *jowro*, followed by the other herds ordered according to kinship proximity to the *jowro*, age and social status. Outsiders would access grazing resources after resident herders. They would also have to pay a fee to the *jowro* ("*tolo*" or "*connji*").²³ Such fee would be paid in kind (e.g. a young bull or a cow, in addition to some cola fruits), and was aimed at recognising the primacy of local herders and of the *jowro*. The *jowro* could restrict access for outsiders' herds, for instance by regulating the length of their stay in the *leydi* (Gallais, 1967; Moorehead, 1998; our fieldwork).

While focused on the management of valuable rangeland, the system established by the *Dina* also has implications for the management of land, water and fisheries. Rules on these aspects vary considerably from place to place. In some area, the *jowro* is only responsible for pastures. Here, land management is performed by other authorities, which vary depending on the area (village chiefs, *bessema*, etc). Water and fisheries are also managed by other authorities (the *jitu*, "master of waters"). The relationship between these authorities and the *jowro* varies from place to place – but often entails some form of

23. While often used interchangeably, strictly speaking these terms refer to two different things – the fee for access to fertile islands (*tolo*) and the fee for access to other less valuable grasslands (*connji*).

supremacy of the *jowro* in his *leydi*. In other areas, the *jowro* is directly responsible not only for pastures but also for land and/or water (e.g. around Djenné and in the Macina). In this context, the role and status of the *jowro* vary substantially not only in relation to the scope of their remit (pastures, land and/or water) but also, for instance, with regard to their wealth (size of their herd; size and quality of the *leydi* they managed) (Gallais, 1967; Moorehead, 1998; our fieldwork).

The system was essentially centred on the role of the *jowro* as the manager of natural resources. However, the *jowro* were accountable to the *suudu baaba*, a group of resident herders claiming descent from the same ancestor. The *suudu baaba* chooses the *jowro* among its members, based on rules that vary – but that generally involve factors such as age and proximity to the previous *jowro*. The *suudu baaba* also played a key role in monitoring the activities of the *jowro*, so as to ensure they contributed to the good management of the delta's resources (Gallais, 1967; Moorehead, 1998; our fieldwork).

The *Dina* consolidated power among the sedentary Fulani communities represented by the *jowro*, within a socio-economic order that favoured the pastoral economy over that of fishing and farming. It was nonetheless an effective system for allocating and controlling access to the delta's rich resources for both resident and outside populations (Moorehead, 1998).

French colonialisation undermined this system for regulating resource access. As Moorehead (1998) noted, while in the case of the *Dina* outside conquest produced a system that was rooted in the local economy and society, that relied heavily on the resources of the delta and that built on pre-existing institutions, the colonial administration had a poor understanding of local resource tenure systems in the area and sought to replace them with a radically different institutional regime. The abolition of slavery, on which Fulani society was based, affected the very heart of the social fabric. Colonial land legislation (land tenure decree of 24 July 1906) stated that all “vacant” land (i.e. long-term fallow or land used on a seasonal basis) belonged to the state. This allowed certain groups to gain access to productive resources to which they had no access under customary systems. The colonial administration also issued directives specifying the dates at which livestock were to enter and leave the dry season pastures. This weakened the ability of the *jowro* to regulate the number and timing of livestock entering their *leydi*, particularly vis-à-vis outsiders (Moorehead, 1998).

The land tenure and development policies of a succession of post-independence governments have exacerbated this situation. The proliferation of state institutions involved in one way or another in allocating access to resources, often without reference to each other, has further weakened the powers of the *jowro*. The cumulative effect of

these measures has been the gradual opening up of the delta's resources to outsiders, without the assurance that their numbers and mode of production are effectively regulated either by the state or by customary authorities (Moorehead, 1998).

Recent developments in policy and legislation have further raised the stakes. The Land Codes ("*Code Domanial et Foncier*") of 1986 and 2000 have recognised customary land rights. This has enabled some *jowro* to assert claims of "customary ownership" over the resources they manage (see below). Under legislation on decentralisation adopted in the 1990s, newly established local government authorities (rural communes) have been vested with the responsibility for managing natural resources within their jurisdiction, including, in the case of the Inner Niger Delta, pasturelands such as the highly prized *burgu* grasslands ("*bourgoutières*"). However, the implementing regulations to operationalise this devolution have not been adopted yet. Similarly, the Pastoral Charter 2001 is a piece of legislation regulating access to pastoral resources. It gives substantial natural resource management responsibilities to communes – although again the necessary implementing regulations have not yet been adopted. These laws have paved the way to tensions between the newly established communes and the *jowro* (see below).

Currently, access to the pastoral resources of the delta is regulated by the "*Conférence des Bourgoutières*", an institution without formal legal backing that brings together government administration, local governments, representatives of user groups, and *jowro*. The Conference meets every year to fix the transhumance calendar (dates of entry into the different *leydi*). In his *leydi*, the *jowro* implements this calendar, opening the crossing into his *bourgoutières*. Although weakened, the *jowro* has thus survived this history of legislative interventions. In most cases, colonial and post-independence administrations have de facto left resource management to the *jowro*, who in turn provided them with informal "gifts".²⁴

6.4. CHANGES IN THE DELTA'S CUSTOMARY RESOURCE TENURE SYSTEMS

The customary resource tenure systems centred on the *jowro* have responded to the evolving ecological, socio-economic and politico-institutional context outlined in the previous sections through undergoing major change. Broadly speaking, such change mirrors the trends identified in the previous thematic chapters: changes affecting the customary institutions responsible for natural resource management (in terms of effectiveness, accountability etc.); commercialisation of resource access relations and

24. For instance, during colonisation, in many places the *jowro* paid a third of the fees they received to the colonial era *chefs de canton*.

emergence of monetarised transactions; and change in resource relations within the family, including fragmentation of larger family units and growing intra-family disputes (e.g. succession). This section reviews nature, direction and extent of this change.

The erosion of customary institutions

First, the *jowro* as a resource management institution has been undermined by socio-economic change and by a century of colonial and post-independence government interventions. For a start, farming interests have acquired weight vis-à-vis pastoral ones, of which the *jowro* are expression. In the 19th century, the *Dina* granted primacy to pastoral interests, in relation to both access to resources and control over labour (many farmers being slaves of the Fulani herders). The abolition of slavery by colonial authorities in the early 20th century began to undermine this system. Since then, many former slaves have acquired resources and invested in land and livestock – thereby acquiring influence vis-à-vis their former masters. With the increasing monetarisation of the economy, access to financial resources has become increasingly important compared to traditional aristocracy as a source of power in the local society. New elites have emerged that are able to draw on this source of power – from better-off farmers to urban elites (civil servants, traders, lawyers and others). As a result of this shift, the position of the *jowro* vis-à-vis these groups has been gradually eroded.

This erosion of the power of the *jowro* has been accelerated by government interventions. For instance, while the *jowro* as a resource management institution has no legal recognition, village chiefs – largely expression of farming interests – are integrated in the administrative structure of the state (lastly under Law 06-023 of 2006). This reflects the greater political/electoral weight of farming interests, and strengthens village chiefs in their relations with the *jowro*. In many areas (e.g. in Saya, in the Dialloubé area), village chiefs have used the leverage derived from their administrative role to gain greater control over pastureland to the detriment of the *jowro*, particularly through the proliferation and expansion of “*harrima*” – village pasturelands, the management of which is traditionally performed by village chiefs rather than by the *jowro*.

In addition, in many areas farming (mainly rice) has encroached on grazing lands, particularly the more fertile ones. This has been explicitly or tacitly supported by the government administration. This is because farming is perceived as more productive than pastoralism, and because farming groups tend to be politically more vocal. Such process was further accelerated after the 1973 drought, with the launch of “*Operation Riz*” (now “*Office Riz*”). We found ample evidence of this agricultural colonisation in our fieldwork. In Saba, for instance, a village in the Dialloubé area, villagers have started to cultivate rice in a pond without seeking the authorisation of the *jowro*, banking on the

support of the local government administration, of an NGO and of a member of the *jowro* family. This expansion of cultivated areas to the detriment of pastureland is on the one hand the result of the loss of influence of the *jowro*, and on the other a further root cause for such loss of influence – as it has eroded the very base of the power of the *jowro*, control over natural resources.

In some cases, the authority of the *jowro* has also been undermined by the proliferation (and hence “inflation”) of the position of the *jowro*. With population pressures, the value of fees paid to the *jowro* has increased dramatically (see below). As a result, the position of *jowro* has become very lucrative, and the wealth of many *jowro* has increased. However, the higher economic stakes, coupled with the growing fragmentation of the extended family, have also fostered disputes over the succession in the position of *jowro*, and encouraged many members of *jowro* families or better educated individuals to term themselves “*jowro*” – despite their lack of formal endorsement by the *suudu baba* (e.g. in Ouro Ali).

Our fieldwork found ample evidence of this shift in power relations and of the erosion of the *jowro*'s influence. We found evidence, for instance, of farmers openly contesting the authority of the *jowro*. In Ouro Ali, farmers have started to challenge requests for payment from the *jowro*, and have sought the support of the mayor. Significant tensions between farmers and the commune on the one hand, and the *jowro* on the other have followed. Here, there have also been contestations of the legitimacy and authority of the *jowro* from within the pastoral community, represented by the *suudu baaba*, particularly in relation to the allocation of the resource access fees collected by the *jowro* (see below).

The *suudu baba* as an institution capable of ensuring the accountability of the *jowro* to the wider group has also been weakened – though this varies from place to place. In Youwarou, the *suudu baba* still meets to discuss and advise the *jowro* on important matters. In Konna, on the other hand, the *suudu baba* no longer functions on a regular basis. Its only function seems to be formally endorsing a new *jowro* at the time of succession. This decline of the *suudu baba* seems associated with the parallel decline of the role of the extended family and with the growing fragmentation of family units. It is also linked to power relations – in Konna, a *jowro* with a strong power base and an assertive personality managed to sideline the *suudu baba* and other possibly competing institutions.

Monetarisisation of resource access relations

Population pressures (see chapter 3 for some statistics), monetarisisation of the local economy and increased competition for access to strategic resources have brought

about a monetarisation of resource access fees, and a steep increase in their value. As the resource base has become scarcer, fees that were historically paid in kind and were of relatively small value (see above) now tend to be paid in cash, and have reached very high values relative to the local economy. While the amount of such fees varies depending on social relations, herd size and pasture quality, and while direct questions about this are taboo, there are reports that herders not belonging to a resident group can pay up to 1,000,000 CFA or more (some 1,000 GBP) for access to a *leydi*. Most herders would not be able to afford such fees. However, many herders today take care not only of their own cattle, but also of livestock entrusted to them by wealthy individuals (e.g. urban elites). It is possible that they use that livestock to help cover resource access fees – and then report them as “lost” or “dead” to their absentee owners.

Increases in the cost of access to resources are also linked to attempts on the part of the *jowro* to extend the duration of the paying period. While under customary law pastoral resource access fees are levied for periods of up to a month, after which the *leydi* can be accessed free of charge, in 2005 the *jowro* of Dialloubé has levied fees way beyond the prescribed date – and obtained the support of the armed police to secure such payments. In the Macina, the access fee period has long expanded to several months (October-March).

In addition to the monetarisation of fees for access to pastoral resources, we found evidence of numerous monetarised land transactions for agriculture purposes. In areas where the *jowro* claims land management or even ownership rights (Konna, Ouro Ali, etc), they have been at the centre of such transactions. These usually entail rental or sharecropping contracts (or combinations of both) rather than sales. In Konna, farmers pay a fix price upfront and a share of produce every year. In most cases, these practices seem part of a “privatistic” management of the resources on the part of the *jowro* – the broader group or even his family not being consulted nor benefiting from these deals (e.g. Konna; Ouro Ali).

These developments are in line with the growth in political influence and in “purchasing power” of farming interests and urban elites vis-à-vis pastoral interests over the past few decades, described above. As the local economy has become increasingly monetarised, access to financial resources has become more and more important in shaping access to natural resources. And, as competition for access to a scarcer resource has increased, resource access fees have risen sharply. As a result, those groups that have easier access to financial resources (from better-off farmers to urban elites) tend to strike deals with the traditional aristocracy (embodied in the *jowro*) to improve their access to resources. In this sense, strategic alliances may emerge between wealthy elites

and traditional aristocracies, with the former being granted access to resources by the latter in return for cash payments or other services. On the one hand, wealthy groups invest part of their savings in livestock, and need the *jowro* to secure access to grazing resources. On the other, the *jowro* are eager to tap into the financial resources that these groups have access to. In our fieldwork, we found examples of urban elites providing services to the *jowro* (e.g. legal advice) and being granted, in return, exclusive grazing rights in the “common” pasturelands managed by the *jowro* receiving the services.

This trend towards growing monetarisation of resource access relations is in line with developments in other parts of West Africa, particularly in contexts characterised by growing population pressures (e.g., on Burkina Faso, Mathieu *et al.*, 2003; on Ghana, Amanor, 2001). At first sight, it seems to confirm the key tenets of the above-mentioned “evolutionary theory of land rights”, according to which population pressure tends to push towards tenure individualisation and monetarised transactions. However, our fieldwork suggests that these issues are far more complex than this theory seems to suggest. In the delta, the process of individualisation proceeds at two speeds in its internal and external dimensions. Externally, i.e. vis-à-vis herders coming from outside the delta, the collective dimension of resource tenure remains strong, and is used to reassert the primacy of the resource rights of local resource users (for findings along similar lines in other parts of West Africa, see Chauveau *et al.*, 2006). As land and natural resources are held by local groups, outsiders must pay for accessing resources while locals must not. Internally, however, a shift has taken place, with the erosion of the customary arrangements for representing the interests of the extended family (see the decline of the *suudu baaba*) and with the growing claims of the *jowro* to manage common resources for private gain.

In other words, what we are witnessing in the delta is not a “horizontal” individualisation of rights, with households and/or individuals gaining greater and stronger rights over the land they use (e.g. in relation to inheritance); but rather a “vertical” tenure individualisation in which customary chiefs increasingly manage common resources for personal economic gain and without consultation of their extended family. Rather than towards a fragmentation of common resources into smaller individual plots, this process of individualisation seems to be evolving towards the privatisation of the bulk of the resource base in the hands of those who were meant to act as their custodians on behalf of the group. Monetarised transactions are developing within this context – with the *jowro* occupying the centre ground, and renting or selling out rights over resources to groups and individuals from outside the extended family for herding or farming purposes.

Differently from research findings from other parts of West Africa, we found no evidence of an evolution towards written contracts, or even towards other

mechanisms to secure land transactions such as witnesses. Deals are usually concluded orally. In some cases, this results in different interpretations of the nature of a deal – with the *jowro* asserting it was a temporary allocation in exchange of a gift, and the farmer claiming it was a sale. In Sio, the *jowro* is reported to have “sold” a pond to a rice grower. As the *jowro* does not own the land, such a transfer would be null and void. A dispute followed, with the *jowro* claiming never to have sold the land. After the intervention of the government administration, the buyer was evicted. No one knows what happened to the money he paid for the land. On the other hand, written documents (“*procès-verbal*”) are sometimes used to formalise key decisions – e.g. the *suudu baba*’s endorsement of a *jowro* succession (e.g. in Koubi, situated in the commune of Konna).

The reasons for this lesser documentation of resource access transactions compared to other parts of West Africa are unclear. A fascinating but not yet well-researched hypothesis relates to the nature of the Fulani customary chieftaincy in the delta and to its attitude vis-à-vis the French colonisers first and the independent government then. This resulted in very low levels of scolarisation among the Fulani and among the *jowro*. Most of the *jowro* we met did not speak French (the official language) and were illiterate. This may partly explain the diffidence towards written documents to secure transactions.

The allocation of the important financial flows generated by the monetarisation of resource access has itself formed the object of bitter disputes – between different members of the same *jowro* family (with different members trying to negotiate resource access conditions with outsiders in order to personally benefit from this – e.g. in Dialloubé), between the *jowro* and the broader group represented by the *suudu baba* (e.g. in Ouro Ali, where a *jowro-suudu baba* dispute was brought before the *préfet*, and the *jowro* was forced to “apologise” to the *suudu baba* for his behaviour), and between the *jowro* and the newly established communes (e.g. in Ouro Ali, where a commune-*jowro* dispute is pending before the tribunal of Djenné). Disputes on the allocation of financial flows have also opposed pastoral institutions and farming interests (for instance in Dialloubé, where a dispute has long opposed the *jowro* of the Dialloubé *leydi* and the village of Gobé on the one hand, and the village of Ouro Alfaka on the other).

Natural resource conflict and dispute settlement

Disputes over resource access and control have always existed in the delta – and some of the current disputes date back to colonial times. In recent times, such disputes have increased in both quantity and intensity. Our fieldwork documented a substantial number of disputes – some of them longstanding, others emerged over the past couple

of decades. They concern the delimitation of *leydi* boundaries (e.g. Konna); the succession in the position of *jowro* (e.g. Koubi, in the commune of Konna); control over *bourgoutières* (e.g. Ouro Ali; Ouroubé Doudé, in the Dialloubé area); the allocation and utilisation of resource access fees (e.g. Ouro Ali); land transactions (e.g. Sio); crop damage caused by herd passage; and many other issues. Disputes may oppose villages or individuals; herders, farmers and fishers; communes and *jowro*; etc.

Another evolution that is taking place is greater use of courts as a dispute settlement forum. While access to courts remains generally limited in much of rural Mali, we found numerous examples of disputes that were brought before tribunals (e.g. the boundary dispute in Konna, the disputes on control over *bourgoutières* in Ouro Ali and Ouroubé Doudé, the succession dispute in Koubi, the dispute over the allocation of resource access fees in Ouro Ali, and many more). And, while in the past judicial disputes rarely went beyond the court of first instance, they now tend to reach the Court of Appeal (now available in Mopti, so that parties no longer need to go as far as Bamako) and even the Supreme Court (in Bamako).

This is linked to the higher stakes associated with the growing value of resource access fees. Indeed, disputes with limited economic value (e.g. crop damage disputes) still tend to be resolved locally. On the other hand, disputes involving high economic stakes (e.g. those concerning *jowro* succession and the allocation of resource access fees) are often brought before courts. This greater use of courts is also linked to the erosion of the perceived legitimacy and authority of customary institutions. Several people told us that while in the past parties to a dispute would accept settlements by village chiefs, *jowro* and other customary authorities, now they are less prepared to do so. This is linked to the erosion of the authority of the customary chieftaincy (see above). And, customary authorities are themselves often involved in disputes, some of which relate to their very legitimacy (e.g. succession disputes).

Greater use of the court system has not necessarily brought greater clarity to dispute settlement. Court decisions, even if final, are in practice very hard to enforce. Disputes settled by final judgements nonetheless resurface, sometimes years or even decades after the judgement. For instance, in Ouro Ali, a dispute between two *jowro* for control over the *bourgoutière* of Diaroukoye was first solved by colonial courts in 1951 – and yet it resurfaced in very similar terms in 2005. The dispute is currently pending before the tribunal of Djenné. There have even been reports that a dispute decided by the tribunal and the appeals court of Mopti was resubmitted under a different name (the same place often has different names in the different local languages). For an example of the complex nature of dispute resolution, see Box 6.1.

BOX 6.1. A SUCCESSION DISPUTE IN KOUBI

Koubi is a village in the commune of Konna. Since the 1980s, a longstanding succession dispute has opposed two *jowro* family members, and their heirs. Part of this dispute was first documented by Maiga and Touré (2001). The dispute first erupted in 1985, following the death of the *jowro* Balakaly Diall. That dispute opposed the son (Sadou Boukary Diall) and the brother (Issiaka Mody Diall) of the deceased *jowro*. Issiaka Mody Diall was first recognised as *jowro* by the *suudu baba*, and obtained a declaration by the Tribunal of Mopti that such succession was “regular” and “consistent with custom” (judgement no. 172 of 1988). However, Sadou Boukary Diall was not involved in the proceeding. He therefore sought the annulment of judgement 172. He claimed that, being the son of the *jowro* and being older than his uncle, he had stronger claims to the succession. The tribunal concluded that Sadou Boukary Diall was indeed the legitimate *jowro* (judgement no. 58 of 1991). Such decision was confirmed by the Court of Appeal (judgement no. 56 of 1992). However, contestations on the part of Issiaka Mody Diall continued, and several other judgements were issued on this matter (e.g. judgement no. 636 of 1994, of the Court of Appeal of Bamako).

In early 2002, following the death of Sadou Boukary Diall, the *suudu baba* chose his brother Bella Boukary Diall as the new *jowro*, applying relevant customary norms (as stated in judgement 636 of 1994). A *procès-verbal* of the *suudu baba* meeting was written by a professional lawyer. On the basis of this document, the new *jowro* sought a “homologation” of his succession by the Tribunal of Mopti – with a view to securing his succession against the continuing claims of Issiaka Mody Diall. Such “homologation” was granted, with the Tribunal of Mopti certifying that the succession was conform to custom (judgement no. 136 of 2002). However, Issiaka Mody Diall appealed against this judgement. He argued that, as the deceased Sadou Boukary Diall was never the legitimate *jowro* in the first place, his brother Bella Boukary Diall could not succeed in the position of *jowro*. The Court of Appeal of Mopti dismissed the appeal and confirmed the regularity of Bella Boukary Diall’s succession (judgement no. 60 of 2003). At the time of writing, the case was pending before the Supreme Court. Meanwhile, a joint commission composed of the two would-be *jowro* and two people from the government administration manages the *leydi*.

Statutory and customary law: complex processes of hybridisation

Over the past decades, the resource tenure system established by the *Dina* has undergone a process of hybridisation with statutory regimes regulated by state legislation. Far from creating a “dualistic” system based on a dichotomy between the “customary” and the “statutory”, state interventions have produced a range of competing hybrids (in line with findings from other parts of Africa; see e.g. Benjaminsen and Lund, 2003). These have fuelled tensions not only between customary and statutory institutions, but also among customary authorities (e.g. *jowro* and village chiefs) and among government agencies (particularly between local and central governments).

The (qualified) protection of customary rights under the Land Code (*Code Domanial et Foncier* 1986, replaced by the Code of 2000, as amended in 2002) has opened the door for courts to interpret and apply customary law. In so doing, they may unwittingly promote a



The Tribunal of Djenné is increasingly called on to solve natural resource disputes. Lorenzo Cotula, 2006.

simplified and standardised version of geographically diverse customary legal systems. For instance, customary *jowro* succession rules vary substantially from place to place. In some places (e.g. Konna), the eldest member of the *jowro* family inherits the position of *jowro*. This rule means that often it is the younger brother of the deceased *jowro*, rather than his son, who inherits. However, in Dialloubé and in Youwarou, *jowro* succession is linked to inheritance of the *jowro*'s herd – which tends to favour the son. In interpreting and clarifying the content of customary succession rules, the Court of Appeal has sought to adopt a flexible formula (judgement no. 636 of 1994 – see Box 6.1). However, it is to be seen whether the succession criteria set out in the judgement in relation to a specific dispute will be invoked in different areas, where customary rules may be different. Over time, this may lead to a situation similar to that characterising Ghana, where judicial application of customary law since colonial time has produced a body of “customary” rules interpreted by courts and following the principles of judicial precedent, rules which differ from customary practice as applied by local resource users (see Box 2.3 on page 32); and/or to a hybridisation of locally applied customary rules towards greater standardisation.

While customary law has been changed by a century of legislative interventions, statutory institutions also operate with a degree of “informality” – with incomplete legal backing and often beyond their legal powers. While the legislation on decentralisation (particularly the Local Government Code 1995) and the Pastoral Charter 2001 vest natural resource management responsibilities with local governments, their lack of the necessary implementing regulations makes them inoperational. Yet, communes are seeking to carve out a role in natural resource management even in the absence of implementing regulations, generating ambiguities vis-à-vis the central government and fostering tensions with the *jowro*.

The extent to which this happens varies from place to place. In Konna, the strong personality and vast wealth of the *jowro* have kept the mayor at bay. On the other hand, we found strong tensions between communes and *jowro* in Sio and Ouro Ali. In both cases, the commune has intervened to defend the interests (and the resource rights) of fishers and farmers against “extortionate” requests from the *jowro*. Tensions also arose in relation to the allocation of resource access fees. In Ouro Ali, while the mayor and his councillors recognised the resource management powers of the *jowro*, they claimed to have a “right” to a third of the resource access fees collected by him. Interestingly, they based such claims on “customary” law – namely on the colonial-era “customary” practice of *jowro* giving a third of their earnings to the *chef de canton*. With decentralisation, they argue, communes are the “legitimate heir” of the *chef de canton*. Although this argument has no legal basis, a dispute between the commune and the *jowro* of Ouro Ali is currently pending before the Tribunal of Djenné. Interestingly, we heard a very similar argument about the “inheritance” of the *chef de canton*’s share at the commune of Dialloubé. The *jowro* deny that payments to the *chef de canton* were part of customary law, insisting that such payments were rather “gifts”.

In some cases, possible tensions between *jowro* and communes are eased by the capture of the municipal council by the *jowro* or his family. In Youwarou, the *jowro* has been elected mayor, and is now at his second term. In Dialloubé, while the mayor comes from outside the *jowro* family, such family holds the majority of the seats in the municipal council. It is by using its capture of the municipal council that in 2005 the *jowro* family was able to impose resources access fees beyond the prescribed period (see above). Indeed, it was the commune that called in the armed police that helped secure payment from incoming herders. These situations are rare, however, as farming interests tend to dominate local politics. Most of the mayors we met were expressions of farming and/or fishing interests, which makes the commune-*jowro* relationship prone to tensions.

Gender

In the Inner Niger Delta, predominant customary law is profoundly gender discriminatory. *Suudu baba* members are men. Only men can be *jowro*. The same applies to most other customary institutions (e.g. village chiefs, *bessema*, *jitu*). Patrilinearity is the norm. As a general rule, women gain access to resources through their male relatives (fathers and brothers, or husbands). On the other hand, elderly women are much valued as the “historical memory” of the group, and may be consulted by the *suudu baba* on issues such as the borders of pastoral lands. Women may also have their own livestock, over which they exert direct control and which can access pastoral resources free of charge.

The hybridisation of customary and statutory law described above has done little to change this situation. Firstly, in interpreting and applying customary law, courts have not questioned its gender implications. The succession dispute of Koubi (see Box 6.1) illustrates this. In stating the customary rules governing *jowro* succession, the Court of Appeal of Bamako stated that candidates must necessarily (“*obligatoirement*”) be men. In fact, this is the very first requirement that a new *jowro* must meet (judgement no. 636 of 1994). In other words, the judiciary has endorsed gender-discriminatory norms without much questioning.

Secondly, mayors and local councillors are elected without gender discrimination. Yet, while in and around Bamako it is not uncommon for women to have positions of responsibility in the commune, this is not the case in the Inner Niger Delta – which presents a very different socio-cultural environment. Here, no woman has been elected mayor. There are a few women councillors in some communes, but this is very rare. Out of the communes we visited, no decision-making position was held by a woman. In Ouro Ali, the accountant we met at the commune is a woman – which is not uncommon, as this particular position matches what is considered the typical “professional profile” of women.

Multifaceted social transformation and change in customary tenure

The previous sections explored some of the main processes of change that are ongoing in the Inner Niger Delta (erosion of customary institutions, monetarisation of the economy, growing conflict, institutional hybridisation). Devoting one section to each of those processes enabled us to identify the main drivers of change and to present them with some clarity. In reality, however, these processes are closely linked – they are rather different aspects of the same complex, multifaceted process of social transformation.

On the one hand, some of these aspects are interlinked by relations of causation or of close interdependence. While the monetarisation of the economy and the ensuing monetarisation of resource access relations are profiting some *jowro* engaged in renting or

even selling out natural resources, they are also contributing to the long-term erosion of the *jowro*'s power. This is because they tend to favour access to financial resources over traditional aristocracy as a main source of power and means for access to resources. Similarly, increasing resource conflict is closely linked both to the growing monetary value of resource access and control, and to the erosion of the perceived legitimacy and authority of customary institutions.

In other respects, some of these phenomena are linked because they are (at least partly) rooted in the same or in similar causes. The declining role of the extended family and the gradual fragmentation of family units have contributed both to the erosion of customary institutions (decline of the *suudu baaba*, “inflation” of the *jowro*) and to the increase in natural resource disputes (including within the extended family). Population pressure and increasing resource scarcity have contributed both to higher and monetarised fees for resource access and to growing resource conflict. The establishment of a state (colonial first and independent then) that – differently to its *Dina* predecessor – did not crucially rely on the local resources and economy of the delta, and that did not properly understand the logic of its local rules and institutions, led to the imposition of an external system of resource tenure – without however the power to enforce this new system at the local level. This contributed to the erosion of customary authorities, to the hybridisation (rather than replacement) of local rules and institutions and to loss of effectiveness in handling resource disputes.

Besides being affected by these changes in the local economy and society, changes in customary tenure are also the outcome of struggles between groups pulling the rules to their advantage. This has important implications for differences along status, income, gender and other lines, as the more powerful are usually able to bend the rules to their advantage. Where their local power base allows (e.g. in Konna), the *jowro* are claiming greater control or even ownership over the resources they manage on behalf of their community. In order to strengthen their claims through advocacy and collective action, the *jowro* have been discussing for years the establishment of an association bringing together all the *jowro* in the delta. Such initiative has so far failed due to internal rivalries – particularly in relation to the leadership of the association. On the other hand, local *jowro* associations with more limited mandates have been established in some districts – but without major impacts so far.

Other groups may endorse or resist the claims of the *jowro* depending on whether they stand to lose or benefit from them. Farmers and fishers facing rising resource access fees tend to contest the claims of the *jowro*. Communes eager to tap into the financial flow generated by resource management may not challenge the claims of the *jowro* as such but reinterpret “custom” to back their claim to a share of those flows. Local lawyers may

support the *jowro* in their court battles to assert those claims – and even encourage them to do so – if they can benefit in return through privileged access to “common” lands. Such support brings not only legal expertise but also contacts in government and in the judiciary, which can help define the outcome of court cases, and, through that, “set precedent” and add legal authority to the interpretation of customary law put forward by the *jowro*. It is the interplay between these claims, shaped by profound social transformation (demographic growth, monetarisation of the economy, fragmentation of the extended family, establishment of the colonial and post-colonial state, etc) and weighted by the different bargaining power of the different actors putting them forward, which profoundly affects the nature and direction of change in customary systems.

6.5. CONCLUSION

In the Inner Niger Delta, customary rules and institutions for natural resource management have been profoundly affected by a century of change in the ecological, socio-economic and politico-institutional context. The authority and legitimacy of many *jowro* have been eroded, within the broader context of a power shift from herding to farming interests. Resource access relations have become monetarised, and the spiralling values involved have fostered tensions over fees and their utilisation. Natural resource disputes have increased in both quantity and intensity. In this context, state interventions in land relations have fostered the emergence of hybrids of both customary and statutory norms. The establishment of the rural communes endowed with (still unclear) natural resource management responsibilities has added complexity to the situation.

In this context, the role and position of the *jowro* and of the customary systems associated with them are at a crossroads. The historical claims of the *jowro* and their asserted resource management skills, as well as their alliance with sections of the emerging economic elites make them still a powerful force in the local society. However, the important transformations that have taken place in the local society and in the legal and institutional framework (particularly with the implementation of the decentralisation policy) have brought about challenges to the authority of the *jowro* and pushed towards a rethinking of their traditional role.

7. CONCLUSION²⁵

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7.1. TO SUM UP

This study has examined change in “customary” land tenure systems in Africa. Given the extreme diversity of local contexts, this study has not purported to document change in the many dimensions of customary systems across Africa. Rather, it has sought to identify key trends by:

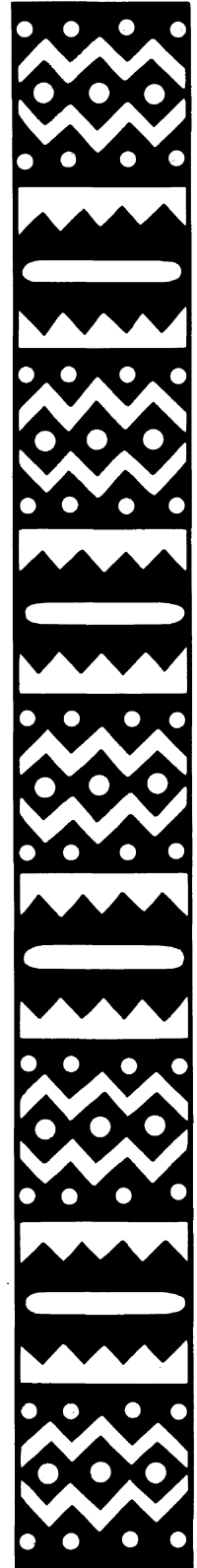
- Focusing on specific aspects of customary tenure, such as customary authorities, intra-family land relations and land transfers;
- Drawing on fieldwork undertaken over the past few years within the context of several IIED-coordinated projects (see Box 1.1 for a few examples), and complementing this with a review of the literature and with new fieldwork in the Inner Niger Delta (Mali).

The result is inevitably a very partial picture of extremely complex and diverse issues. Nevertheless, while being careful to avoid easy generalisations, some lessons can be drawn from this research.

7.2. “CUSTOMARY” TENURE IS CHANGING

The first obvious point is that “customary” land tenure systems are changing. This is not new. For a long time, it has been recognised that, far from being static, customary systems are continually reinterpreted and readapted (usually by more powerful actors) to fit changed economic, social, political, cultural and environmental contexts and

25. This chapter has benefited from stimulating conversations with David Palmer and Paul Mathieu.



challenges. What this study has added is the mobilisation of a body of empirical evidence on the root causes, nature, extent and effects of that change in a range of contexts (mainly from West Africa).

A context of profound structural transformation

Chapter 2 of this study has documented the extent to which the African continent is undergoing major transformation. Population pressure is increasing in many parts of Africa, and competition over land is rising as a result. Urban settlements are growing fast, encroaching on agricultural land and attracting youths from rural areas. In many places, livelihoods are changing, in some cases towards greater diversification – with many rural households increasingly relying on a range of off-farm activities in rural areas, as well as on income from urban areas. Local production systems are becoming more integrated into the global economy, with export crops expanding into areas previously used for locally consumed products. Many new actors are investing in land, for productive and speculative purposes. International migration generates major financial flows (remittances), which may affect local land relations in the home country. Socio-cultural change driven by the cheaper communication technology and easier cultural exchange is affecting the way “tradition” is interpreted. Government policies and laws struggle to be properly implemented in rural areas, but nonetheless produce intended or unintended outcomes that affect social relations on the ground. Conflicts and epidemics like HIV/AIDS are also affecting land access and management.

Such profound changes were also documented by our case study on the Inner Niger Delta (chapter 6). This found evidence of substantial demographic growth and profound changes in social and economic relations. It also documented change in rainfall over the past 50 years, which has resulted in change in the ecological context (e.g. reduction in duration and area of the annual flooding). This finding raises wider issues on the still little documented but possibly major implications of climate change for the natural resource base in Africa, particularly in dryer areas like the Sahel.

These processes do not affect the African continent in a uniform way – they are highly diversified in both scale and effects. Demographic growth and population density vary substantially across and within countries (see Table 2.1 and Figure 2.1), and urbanisation processes are highly uneven (see Table 2.2); while some parts of Africa have long been integrated in international trade (e.g. the cocoa-growing areas of Ghana), others are much less so (e.g. parts of the dry Sahel); international remittances are concentrated in countries and areas with strong migratory outflows; the spread of HIV/AIDS has struck southern Africa more heavily than other parts of Africa; and conflict has devastated some areas (e.g. the Great Lakes region) more than others.

Linking social transformation and changes in customary systems

These processes of profound social transformation have had major implications for customary land tenure systems. In some cases, these implications are well documented, and causal links can be established. There is a vast body of literature, for instance, on the relationship between demographic growth and change in land tenure (see section 2.2). In other cases, causation is more difficult to establish – but some relations can nevertheless be shown on the basis of available evidence (e.g. on the possible effects of remittance inflows on local land relations; see section 2.4).

Also, the repercussions of social transformation processes for customary land tenure tend to vary substantially, based on the extreme diversity of local contexts. Great diversity concerns not only the extent to which processes of structural change are underway; but also the different ways in which a given change affects different local land tenure systems. This is because the land tenure change brought about by those processes of social transformation is shaped by the local context. Where monetarisation of the economy and agricultural intensification have taken place within a context of increasingly weak customary systems, they may have accelerated the decline of such systems. But where customary institutions were strong, these seem to have managed to adapt and capture the benefits of that change (e.g. in many parts of Ghana). Similarly, while evidence from parts of Africa seems to suggest the key tenets of the so-called “evolutionary theory of land rights” (whereby population growth tends to push toward more individualised tenure), evidence from our fieldwork shows that tenure individualisation may arise also in absence of major population pressures, and that population growth may be associated with a “rediscovery” of the collective dimension of land tenure (see chapter 5).

Changing customary authorities, intra-family relations and transfer mechanisms

The core of this study (chapters 3 to 6) has documented key trends in change affecting customary resource tenure systems. Chapter 3 examined change occurring in customary institutions in a few cases from different parts of West Africa. Given the extent to which customary institutions are linked to other local and central institutions (in relationships that range from cooperation or even capture to competition), we examined customary institutions not in isolation but within their broader local context, using the concept of “local land regulation framework”. What we found is an extremely diverse situation. In some cases, customary institutions have managed to maintain or even strengthen their power over the past decades, including through strategic alliances with central government authorities, capture of local government bodies, and control over land and related revenues. In other cases, customary institutions have been eroded by a large influx of incomers, by competing central and local government institutions, and by

emerging economic powers. In yet other cases, while customary institutions are still effective in regulating land access, the collegiate bodies that used to oversee their work are not; the result is a breakdown in accountability and a privatisation of common lands, including through land sales and rentals without consultation of, or benefit for the broader community (e.g. in peri-urban Ghana; see also chapter 6, on the *jowro* of the Inner Niger Delta).

This study has also documented changes in intra-family land relations (see chapter 4). While extended family groups continue to play an important role as land management units in many parts of rural Africa, demographic change, urbanisation, commercialisation of land relations and other factors are pushing towards land management decisions being taken more and more at a household or even individual level. In many places, the elderly are no longer able to fulfil their responsibilities to their sons; as a result, the latter withdraw their labour, and lose rights over family land. Within these processes, the land claims of more vulnerable family members may be weakened. Women's access to land may become more vulnerable, while land scarcity may foster tensions between older generations traditionally controlling land access and younger generations left with more limited land access opportunities (see chapter 4). These intra-family tensions may in turn foster tensions between groups, with autochthons seeking the return of land given to incomers in earlier generations, when land was more abundant (see chapter 5). The fragmentation of extended family units and the weakening of collective decision-making fora may also bring about the erosion of mechanisms ensuring the accountability of customary land and resource management authorities – as evidenced by our case study on the Inner Niger Delta (chapter 6).

Another type of evolution documented in this study is the emergence of monetarised land transactions (see chapter 5). This includes the monetarisation of “customary” forms of land transfers, such as the “*tutorat*” arrangement between autochthons and incomers in West Africa²⁶; and the emergence of “new” types of land transactions such as “sales”. These changes bring about new practices such as use of witnesses and of written contracts. The arrangements produced by these changes (whether forms of *néo-tutorat* or market transactions) remain deeply embedded in complex social and political relations. This trend toward greater monetarisation of resource access relations is confirmed by our case study on the Inner Niger Delta (Mali), where monetarisation has affected both access to pastures and access to farming land (see chapter 6).

It is difficult if not impossible to predict how these changes may further evolve over the next decades. However, most of the key “drivers of change” identified in chapter 2

26. For clarification of terms like *tutorat* and autochthon, see chapter 5.

are likely to continue or even accelerate. This includes population growth and urbanisation (see the projections reported in Tables 2.1 and 2.2), trade liberalisation, social, economic and cultural change, and government interventions in land relations. In other words, the forces that have pushed the changes in customary systems documented in this study are likely to continue. This may lead to a deepening of those changes (greater tenure individualisation, monetarisation of land access relations, change in customary authorities, etc.) over the next decades.

7.3. LIVELIHOOD IMPLICATIONS OF CHANGE IN TENURE SYSTEMS

These profound changes in land relations have important implications for the livelihoods of resource users. In much of rural Africa, land is of crucial importance to economies and societies, constituting the main livelihood basis for a large portion of the population. In most African countries, agriculture is a main economic activity, and access to land is a fundamental means whereby the poor can ensure household food supplies and generate income. This applies both to societies in which subsistence agriculture is prevalent, where access to land is the *sine qua non* of household food security; and to societies where agriculture is more market-orientated, in which family farming provides a principal source of employment generating the income with which to buy food. Even where agriculture and land are becoming less important with the growth of alternative sources of income, secure land rights provide a valuable source of income for investment, retirement or security in case of unemployment (Cotula *et al.*, 2006).

In this context, the changes outlined in this study bring about winners and losers. Although there are significant differences between and within countries, the structural changes identified in chapter 2 (demographic growth, urbanisation, integration in the world economy, etc.) are pushing towards fiercer competition over high-value land, towards greater individualization of rights, towards the monetarisation of resource access relations, and towards a renegotiation of the socio-cultural factors underpinning land access (from family structures to autochthon-incomer relations). These processes are likely to continue over the next decades, given the likely continued impacts of the structural changes feeding those processes. In this process of social transformation and increased land competition, weaker groups tend to lose out. As resource access relations become more monetarised, those with more access to financial resources are able to gain control over valuable resources. And, conversely, those with weaker financial resources may lose the resource access they enjoyed. Our chapter on the monetarisation of land relations in West Africa (chapter 5) found evidence of

longstanding “incomers” being deprived of their land by the landholding autochthons, and of these re-allocating the land to new incomers endowed with greater financial means. Our case study from the Inner Niger Delta (Mali) also found evidence of urban elites buying large numbers of livestock and securing exclusive access to “common” resources for herding or commercial farming (chapter 6).

In many countries, assertive “customary” chiefs are also standing to gain from these changes. In many parts of Ghana, they are reinterpreting their guardianship powers as those of owners, and are allocating or selling common lands for private gain (see chapter 3). In the Inner Niger Delta, the *jowro* are greatly benefiting from the substantial payments they receive for access to pastures and, in some cases, to land (chapter 6). In some cases, strategic alliances may emerge between wealthy elites and traditional aristocracies, with the former being granted access to resources by the latter in return for cash payments or other services. In the Inner Niger Delta, for instance, we found evidence of urban elites providing services to the *jowro* (e.g. legal advice) and being granted, in return, exclusive grazing rights in the pasturelands managed by the *jowro* receiving the services (chapter 6). In this context, weaker rural groups are being squeezed out, and may lose access to the resources on which they depend for their survival.

As discussed (chapter 6), these powerful actors are not only standing to gain from intervened change – to a certain extent, they are also “steering” that change. Change in the rules of the game is not only a function of profound social transformation, but also the outcome of struggles between groups trying to reinterpret the rules to make the most of that transformation. This has important implications for differences along status, income, gender and other lines, as the more powerful are usually able to bend the rules to their advantage. For instance, where their political clout allows (e.g. in parts of Ghana and Niger), customary chiefs are claiming greater control or even ownership over the lands they manage on behalf of their community. As for gender, in some places men are reinterpreting the rules to undermine women’s land rights in a context of increased pressure over land. In Maradi (Niger), for instance, women seclusion practices based on religion and custom are being “rediscovered” as a way to keep women off the land (Doka and Monimart, 2004; see chapter 2). Typically, those who are better able to “steer” change in the rules are more powerful actors that draw their power from a range of sources and from wearing several “hats” – members of the traditional aristocracy who may be involved in economic activities, in politics (sometimes as elected local councilors or parliamentarians) or in the government administration (directly or through privileged contacts and alliances).

7.4. IMPLICATIONS FOR POLICY AND PRACTICE

In much of rural Africa, “customary” land tenure systems are experiencing profound change, as a result of dramatic structural changes in economies and societies. If projections are right, these changes are likely to continue over future decades. While some powerful actors stand to gain from these processes, weaker groups are losing out. This raises challenges for development policy and practice. Given the very nature of this study (identifying key trends in relation to very complex and diverse issues, drawing on evidence providing only a partial picture), our research and analysis cannot provide specific “policy recommendations” that would be relevant to extremely diverse contexts. It can, however, raise a few issues to be taken into account when developing context-specific directions for policy and practice.

In most cases, the issue is not *whether* governments should intervene to regulate local land relations; but rather *how* they should do so. In much of Africa, governments have interfered with customary tenure systems since colonial times. As a result, so-called “customary” systems have been extensively manipulated by colonial and post-independence governments, and encompass a wide range of mechanisms that combine customary, statutory and other norms (see section 1.3). Far from being clearly delimited and mutually exclusive, the customary and the statutory are usually intertwined in complex mosaics of resource tenure systems. This point has important implications for ongoing debates on the “formalisation” of “informal” systems of property rights, as the line between the “formal” and the “informal” is the most cases blurred. It also undermines the argument of those seeking to protect the (often idealised) customary/informal systems from state interference.

In many contexts, sensible and effective government action is needed. Where customary systems have been eroded by social, economic, cultural and political change, government intervention may be needed to provide effective land management. Even where customary systems seem to work well at the local level, government intervention may be required where powerful outsiders that do not feel bound by those systems (e.g. urban elites, foreign investors) enter the land arena. In these cases, lack of legal protection for local land rights based on customary systems may result in local resource users losing land access. And, whether customary systems are still working well or not, government intervention may be needed to secure the resource claims of weaker and more vulnerable groups – who stand to lose out in ongoing processes of change in local land relations.

The key question then is what type of government action is needed. The answer to this inevitably varies from context to context. It also depends on the government’s vision of agricultural development, in relation to issues such as the balance between agribusiness

and smallholder farming, and the relative importance of objectives like efficiency and equity. Different models of agricultural development require different approaches to land tenure policy.

Overall, however, recent emphasis on the need for state legislation to build on local tenure systems (rather than attempting to “replace” them with systems “imported” from elsewhere) is a major step forward compared to the past (see e.g. Deininger, 2003). Ongoing debates on the formalisation of land rights (which draw on the work of Peruvian economist Hernando de Soto and which tend to be centred on individual land registration programmes) need to avoid the trap of appealing but simplistic one-size-fits-all solutions. Most resource users in rural Africa obtain access to land on the basis of diverse combinations of statutory and customary entitlements, which typically involve multiple and overlapping rights over the same resource. Policy makers cannot ignore this basic fact. Nor, in the short term, can they hope to radically change that. In these contexts where resource access rights are multiple and overlapping, registering individual property rights would raise important technical challenges, and would entail that unregistered right holders lose access to vital resources. Therefore, legislation that aims to secure resource claims based on locally recognized tenure systems, rather than to overhaul them, is in many cases the most effective way to secure access to natural resources.

The issue is how to do so in practice – particularly in the light of two challenges. On the one hand, this study has revealed the extent to which local tenure systems are changing. Government interventions take place in this fluid context, both affecting it and being shaped by it (at least in terms of implementation at the local level). The customary “rights” to be secured are often not clearly defined legalistic entitlements; but claims that evolve and are continuously re-negotiated following changes in social relations. Ascertaining who has right over what (and hence what rights to secure) is therefore a challenge in itself. Equally, government interventions attempting to secure local land rights by “freezing” their content and nature are unlikely to work in contexts characterized by profound social change.

On the other hand, the findings from this study show that temptations to idealise the “local” should be resisted. Many customary systems are very inequitable as regards social status, age, gender and other aspects. And, in the process of change affecting customary tenure systems in many parts of Africa, local elites – those with more information, contacts and (financial and other) resources – are steering that change and making the most of it. In these processes, weaker groups are losing out. These processes are likely to continue over the next decades, and to deepen existing inequalities. Government interventions to secure customary land rights may end up supporting and even exacerbating these processes of privatization and resource grabbing. This raises the challenge of finding ways

to “square the circle” of recognizing and securing local land rights, which are the entitlement through which most rural people gain access to land, on the one hand; while avoiding entrenching inequitable power relations and unaccountable local institutions, on the other.

As there is no universal solution on how to secure local resource rights in Africa, emphasis should rather be on the process to design and implement context-specific approaches. This raises the need to properly understand the changing dynamics of customary land tenure in that specific context; to fully take account of these dynamics, and of the diversity and often overlapping nature of land rights, in devising tailored interventions to secure local resource rights; to tackle power imbalances at the national as well as at the local level; and to establish processes for accountability and transparency in both policy design and implementation.

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Changes in “customary” land tenure systems in Africa

Edited by Lorenzo Cotula

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Across rural Africa, land legislation struggles to be properly implemented, and most resource users gain access to land on the basis of local land tenure systems. There is growing recognition that land laws must build on local practice. In recent years, several African countries have adopted legislation that strengthens protection for local land rights. This raises the need to understand what is happening to land tenure systems on the ground. Although they claim to draw their legitimacy from “tradition” and are commonly referred to as “customary”, local tenure systems have been profoundly changed by decades of colonial and post-independence government interference, and are continually adapted as a result of social, economic, political and cultural change. As land constitutes the main livelihood basis for a large portion of the rural population in Africa, changes in tenure systems have important implications for the livelihoods of resource users. This study explores changes in customary land tenure systems in Africa, identifies the factors driving such changes, analyses their livelihood implications and draws lessons for development policies and programmes.

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