Making land transactions more secure in the west of Burkina Faso

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This document summarises the results of a study on "Ensuring the security of land transactions in the west of Burkina Faso"[1] It begins by describing the main features of land transactions and their dynamics in two locations, and then provides an analysis of how to ensure security of land rights. Finally, it presents various proposals for 'regulating' and supporting current changes with procedures to facilitate a pragmatic formulations of the new transactions and give them social visibility.

1. "Ensuring the security of land tenure transactions in Burkina Faso", Ouagadougou and Paris: Min. of Agriculture and GRET, 51 pp. + annexes. The fieldwork was conducted by J. Baud, E. Bologo, N. Koné and K. Triollet, with and under the supervision of Lacinan Paré and Mahamadou Zongo. Paul Mathieu was responsible for the methodological and scientific coordination of the study, with support from P. Lavigne Delville. The latter, in conjunction with H. Ouédraogo, also helped to clarify and flesh out some of the proposals and recommendations.

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1. Social change and new land tenure practices: The issues

In the west of Burkina Faso, rural land tenure systems are undergoing rapid change, affected by a number of processes, transitions and transformations. In particular, in some areas, a growing number of transactions are occurring in which land permanently changes hands in return for cash. Other new practices are also changing the land tenure situation, such as temporary leasing of land for cash, and enforced repossession of land previously granted to a tenant, resulting in conflict.

These new land tenure practices are becoming more frequent and visible. They reflect a period of uncertainty, a time of "hesitation" (Karine Triollet) as people find themselves between two systems and two periods: a time not long ago when customary principles were the point of reference; and an uncertain future, in which new rules and norms seem inevitable, including the commercialisation of land. The stability of long-standing customs seems to be weakening in many places, and yet tradition is still very much alive and meaningful for the communities concerned, as a source of legitimacy and the binding element in social relationships.

In many places, the current changes also reflect tensions of growing intensity between different social groups: the young and the old; indigenous people ("locals") and incomers; farmers and "new investors in land"; local actors and those from outside the village; etc. Caught up in these tensions and contradictions, the competing parties appeal to a multiplicity of standards, sources of legitimacy and regulation procedures. They refer to "tradition", often reinterpreted or simplified, modern law, the nation (in the phrase "we are all Burkinabé"), and the need for and power of money, which confers a "cash value" on the land.

The rights deriving from new cash-based land transactions would appear to be the most ambiguous and uncertain: rights of use deriving from open-ended loans of land; leasing arrangements or various forms of temporary transfer of rights; "sales"; "grants" and various forms of transaction tantamount to a "sale". Various new forms of transaction are emerging, which allow rights over land to "circulate" to a certain extent. The situation is therefore one of partial and "imperfect commodification" of land (Le Roy, 1995), and this situation is likely to continue indefinitely.

Since they are codified neither by custom nor by law, these new land transactions are often performed with a degree of ambiguity as to their content and effects.

In the face of these changes, the existing legislation often seems to be founded on principles far remote from the local realities of land tenure.[2] It sets out a legal framework which seems unsuited or, in any case, inaccessible to the farmers concerned. Because it fails to recognise land rights deriving from tradition and local history, it keeps rural dwellers in a situation of *de facto* legal insecurity. When it does recognise these land rights, it is on the basis of a right to personal use which is not transferable. For this reason, it provides no clear answers to the practical problems faced by farmers, and no clear pointers for the administrative authorities to whom the farmers turn for guidance on land tenure issues.

2. The institutional and legal framework for these changes in land tenure practice is complex, conditioned by various legal and regulatory texts. Some have a direct application to land tenure, such as the *Réorganisation Agraire et Foncière* (Law on agrarian and land tenure reorganisation – RAF) and the decrees implementing it, while others have an indirect impact on land tenure management, for example the *Texte d'Orientation de la Décentralisation* (text implementing decentralisation – TOD), the regulations governing the transformation of hamlets into administratively distinct "villages", the texts laying the basis for the future rural local authorities (communes rurales), or the law governing co-operatives and other associations in Burkina Faso.

2. New forms of transaction and causes of land tenure insecurity in two regions in the west of Burkina Faso

2.1 The case of the long-settled cotton-growing area[3]

The term "long-settled area" (*vieille zone de colonisation*) refers to the western and north-western region of Burkina Faso, north of Bobo Dioulasso. The development of cotton growing has led to significant migration into the area, mainly from the Mossi central plateau, which was densely populated and particularly badly affected by drought in the 1970s and 80s. Encouraged by the central government, this migration by hundreds of thousands of Mossi farmers has brought about rapid and profound economic and social change in this region: growth in the population of existing villages, the creation of new hamlets peopled by incomers, an extension of cultivated areas, and land saturation.[4]

Background, dynamics and principal causes of land tenure insecurity

Background

Land, an increasingly scarce and much-coveted resource, is now the bone of contention between locals and incomers. Over the years, the former have almost exhausted their reserves of land by delegating various land rights to incomers and now see no alternative but to claim back their land, which the latter resist. There is also opposition between farmers and herders; grazing areas are gradually being converted to fields and cultivated areas are subject to crop damage by livestock.

The land tenure issue in the area is strongly influenced by two factors. On the one hand, a new generation of farmers has grown up. Members of this new generation (both locals and incomers) are now becoming heads of household in a context of land scarcity. The strategy of the former is to call into question the rights formerly delegated to incomers by their eld-

3. This section is based principally on a memorandum regarding the Bama-Padéma area drafted by L. Paré.
4. Cf. Paré et Tallet, 1999

ers. On the other hand, the younger generation of incomers, who were born in the area settled by their parents and therefore have little or no connection with the areas they came from, want to exercise permanent rights of use over the lands inherited from their parents. Such circumstances generate different strategies and different points of view: hence, an increase in conflict and occasional outbreaks of violence. At the same time, a range of "new actors" has appeared on the rural scene with a strong interest in acquiring land, including civil servants, politicians, and businessmen.

Differing local situations

The situation, however, differs considerably from one *département* to another. In the Bama *département*, close to the town of Bobo-Dioulasso, the main people seeking land are urban-dwellers who hope to buy land for cash. However, in Padéma *département* (nearer to Kouka *département*, where conflicts resulting from the reclaiming of land and tension between incomers and locals are many and violent), the main money-based transactions to have emerged over the last ten years are leasing and rental. Such arrangements are becoming increasingly common and in some places are tending to become formalised, by the drafting of a written contract. The study did not find any sales in this area.

Recent trends

While loans were until recently the dominant tenure arrangement, there has been a major shift towards the leasing and outright sale of land. The arrival, in increasing number, of urban élites seeking land has accelerated the process. Nowadays, land can be rented and purchased, both of which are emerging as the main means of access to land in the area. However, these new practices are open to misunderstanding and lack transparency; rather than bringing a sense of security to the parties concerned, they create much uncertainty and expose both land owner and land user to greater insecurity. Leasing arrangements (mostly informal) and short-term loans are now replacing long term loans as the main form of access to land for farmers who are not indigenous to the community, whether they be long-established incomers or more recent settlers.

Repossession of land

The withdrawal by a local land owner of land previously granted to another generates a rapid circulation of land between people in the same area,

and from the poor to the better off. Such withdrawals create resentment between locals and incomers, and between one incomer and another and lead to former settlers collecting their belongings and setting off to the southern part of the country.

Repossession is a unilateral act, therefore not a "transaction" in the true sense of the term. Often it is merely the first step and necessary condition for a further transaction: the leasing or sale of the repossessed land, or a part of it, either to the former user, if he has the means available, or to someone else. Since this behaviour is not legitimate or defensible in traditional practice, withdrawals are often disguised in a form of words which refers to socially acceptable motives. These include failure on the tenant's part to respect custom or taboo, or a need for land on which to settle the children of the land owner (which may well be the true reason, at least where some repossessions are concerned).

Many withdrawals are carried out with violence and without notice. At the start of the farming season, the owners go and pull up the young plants, re-plough and re-sow the field. This kind of action is a major cause of insecurity for the victims and, moreover, it is considered socially unacceptable. But such repossessions are part of an evolving cycle of mistrust and an escalation of acts which each side sees as a defensive measure in the face of a threat from the "other group". Incomers try to gain a permanent hold on land which they received as a gift or loan, and for which – according to custom – they should continue to fulfil a number of social obligations. These include acknowledging the underlying land ownership rights of the locals, maintaining good relations, and performing a number of symbolic services to foster agreement with the owners, though these may be transformed by the land-owner into growing demands of a financial nature. The planting of trees without permission, or a refusal to perform the ritual services at harvest time, are gestures used by an incomer to express their assertion of greater independence in respect of land tenure, and today they are becoming increasingly common in the cotton-growing area. To pre-empt this danger, or because they have pressing financial needs, many locals claim back their land without giving any notice, to prevent the "tenant" from preparing for such a repossession. In these circumstances, the dynamics and social climate surrounding this issue are hardly calculated to lead to consensus or compromise. More and more often, unilateral repossessions carried out in this way are contested by those using the land, who complain to the gendarmerie or the administrative author-

ities. The most common reaction of the latter is to condemn those seizing back their land.

Leasing arrangements

Leasing is increasingly practised openly in the *départements* of Padéma (where leasing seems more widespread than sales of land) and Bama (where sales are more common). Originally, it was mainly flood-plain land (*bas-fonds*) that was leased in this way and used for market-gardening, rice or cotton-growing, but the practice has now spread to all types of land and crop. In fact, traditional cereals and cotton are the two crops most commonly grown on rented land. Land is always leased by a local owner to an incomer, who may have arrived recently or been in the area for a long time. Between local people, the practice is forbidden, except in the case of state or project-developed land, such as the belt of irrigated land around Bama. Here it is permitted to lease to anyone – local to local, husband to wife – as if the project had purged the land of all social connotations which might have constrained land relations acceptable on "customary" land.

Leases tend to be short-term, often for a single year, but commonly renewable several times. However, this means they can also be renegotiated each year, which give the tenants a sense of security, especially if they need to invest in inputs such as fertiliser, in the case of cotton, and recover their outlay over two or three years. When the duration is not clearly stated at the outset ("maybe two or three years", or some similar formula), the land-owner will be sorely tempted to repossess the land after one year, especially if the tenant has fertilised the plot well.

Rents tend to be similar within a village, but differ between villages, which points to the emergence of "local rental markets" depending on supply and demand in a particular locality. Rents range from 7,500 CFA francs[5] per hectare per year for poor land on which to grow traditional cereals to 12,000 fr/ha/year for good, well-situated flood-plain land for growing cotton in the Bama area, where demand is strong.

Some 95% of leasing arrangements are contracted informally, by "gentleman's agreement" with or without witnesses, where the land-owner feels

5. 1,000 CFA francs is equivalent to 10 former French francs, now worth 1. 53 euros. Hence, 7,500 CFA francs is appoximately 11.48 euros.

he can trust the prospective tenant. In cases of this kind, the degree of tenure security is inadequate from the tenant's point of view, and is unlikely to motivate him to invest in fertiliser. In some places, such as in Padéma *département*, formalisation of leasing arrangements is becoming common practice, having been introduced on a voluntary basis by the leaders of both local and migrant communities. This is because they have seen this system – when practised openly and backed by a "*petit papier*" (unofficial contract) – to be a good way of averting or limiting conflicts arising from sales and repossessions, which threaten good relations between groups.

There is no standard form for such contracts, but most "*reçus de locations*" (rental receipts) – the name given locally to such arrangements – include the identity and place of residence (village, district) of the parties involved, the area of the plot in question and its location, the duration of the lease, the sum of money involved, the identity of the witnesses, the identity of the village administrator (especially in the case of agreements made with new actors), and the date of signature. Such agreements differ from sale contracts in that the signatures are not authenticated and the deed is not registered by the local administrative authority.

"Sales"

Those selling land tend to be young locals who have repossessed family or ancestral land because they want to invest in new activities, purchase a vehicle or build a permanent dwelling using modern materials. They may also be members of the older generation faced with financial problems. Purchasers are, for the most part, businessmen, traders, politicians or migrants with sufficient cash.

Initially, land "sales" were highly restricted: only members of the vendor's lineage were entitled to buy. There then arose a situation whereby any individual (incomer or town-dweller) could ask to purchase land, but the procedure was subject to the approval of the vendor's broader family. Now, such approval is no longer required, which can result in fraudulent or hidden sales which have been carried out without the knowledge of the vendor's family. The same plot may be sold to several purchasers, which gives rise to a growing number of conflicts in *départements* close to the town of Bobo-Dioulasso.

Land sales follow different procedures depending on whether a written contract is involved. Informal sales, with or without written documents,

accounted for almost 50% of the cases in our survey. They often involve sales of land to resident incomers of long standing, for whom they may offer the only possibility of remaining in the area. This form of disposal is the most likely to give rise to subsequent disputes and is therefore a major cause of insecurity.

There are three forms of sale supported by a written document:

"Sales" backed by a local receipt (or "petit papier"*)*
A local receipt is a document drawn up between vendor and purchaser, but which has not been rubber-stamped or registered by the government. The purchaser tends to be a resident incomer, and this arrangement accounts for roughly 10% of the "sales" noted in the survey carried out in 1999 in six villages in the *départements* of Bama and Padéma. Such receipts bear the identity of the transacting parties, the area of the plot, the rights granted, the location of the plot, the amount involved in the transaction, the identity of the witnesses, the signatures of the parties and witnesses, and the date of drafting.

"Sales" supported by a deed ("papier"*) registered by the government*
In this case, in addition to the elements mentioned above for local receipts, the deed of sale bears references to the identity documents of the various parties (vendor, purchaser and witnesses) and is certified by the préfet (the district administrator). It confirms a total transfer of rights from the vendor to the purchaser, who may therefore freely undertake any activity he chooses on the plot concerned.

Grants supported by a "procès verbal de palabre"
This is when a family or clan delegates rights to a would-be user of land. It is a transfer resulting from a collective decision on the part of the family or clan holding a right of ownership. The transaction is supported by a document known as a "*procès verbal de palabre*" (PVP which are written minutes of a discussion held in the presence of a government official). This includes the following information: the name of the representatives of the local family or clan which is the "customary holder" of the land, the name of the beneficiary, the area of the land in question, sometimes the intended use of the plot (orchard, farm, etc.), the rights transferred and any restrictions, the location of the plot, and the signatures of the various parties. The signatures are authenticated by the administrative authority. This type of sale is sought by members of the urban élite, who want assured ownership rights to the land they are acquiring.

2.2 Current practices, expectations and demands

Withdrawals of land

Once land has been repossessed unilaterally, without notice or dialogue, there are few grounds for compromise. The situation is one of confrontation and competition with each party affirming its unilateral and "independent" right vis-à-vis the other. Various outcomes are possible.

- An *ad hoc* solution: converting the grant of land into a leasing arrangement

When there is a good relationship and open dialogue between the parties, the repossession or threat of it, can sometimes result in a solution which provides security, if the former land-user agrees to rent the land previously granted to him in the form of a loan.

- A collective solution: promotion of leasing as a way to avoid sales and resulting conflicts

At Padéma, agreement has been reached between local leaders and the incomer community leaders to encourage and formalise leasing arrangements as a way of avoiding repossessions and sales and the conflicts to which they give rise, which are all too common in neighbouring *départements*. This local initiative undoubtedly depends on a well-balanced situation, good communication and a mutual desire for compromise between local customary authorities and incomers. It is also no doubt facilitated in this case by the existence of a Village Administrator (RAV[6]), who helps owners and tenants wanting to formalise the lease agreements they have concluded by signing a "*petit papier*". This is certainly the preferred solution for the younger generation of local people who want to maintain their family's land rights with a view to settling and using the land themselves at some point. Of course, it is not a miracle solution which will completely do away with repossessions and sales. These two modes are probably inevitable, but they can no doubt be limited by the emergence of a land-rental market which is relatively open and effective in meeting the needs and expectations of both parties: for money on the one hand and land on the other, at an acceptable price and with an adequate degree of security for both.

6. *Responsable Administratif Villageois.*

Leasing arrangements

Only a very small number of leasing arrangements (5% of all those recorded) are formalised by the signing of a "*reçu de location*" (tenancy receipt), and even these are concentrated in one particular *département*. However, the discussion which took place at the local meeting, held to validate the results of this research, indicated a significant interest in extending and, in due course, generalising this practice.

Sales

Many sales are still transacted on an informal basis, with witnesses in attendance (at least for the purchaser, not always for the vendor), but without a written document. In such cases, subsequent challenges and disputes are very common. Only 50% of sales are as yet being formalised with a written document.

The role of the "administration"

Though they are still asked to validate transactions and intervene in conflicts, customary leaders (such as land chiefs, village chiefs) are increasingly being superseded in their role as arbitrator by the state administration. The *préfet* (District Administrator) and RAV (*Responsible Administratif Villageois*) now play the major role in validating transactions and settling conflicts.

Disputes and insecurity from new forms of land transaction

The main causes of tension in the long-settled cotton-growing area are first the unilateral repossession of land, which had originally been transferred by gift or open-ended loan, and second, the converse strategy adopted by incomers: appropriation of land received as a gift or loan, and the de facto declaration of independence by refusing to carry out the customary services or make symbolic payments, or by planting trees without the agreement of the local land-owner. An additional cause of tension stems from unclear leasing arrangements and "ambiguous sales", such as covert arrangements, without witnesses for the vendor and without a written document.

2.3 A new frontier region: Mangodara département Comoé province[7]

The south-west region, to the south of Bobo Dioulasso, unlike the long-settled cotton-growing area, has long remained an agro-pastoral region, with low population density. Only recently has immigration become an important factor, with incomers arriving from the Mossi plateau, the over-populated lands of the settled cotton-growing area, and from neighbouring Côte d'Ivoire. Many "new actors" are also active in the area, investing in land to turn into orchards or plantations. Although the region is still thinly populated, a race to acquire land has begun.

Background and causes of tenure insecurity

Traditional methods of providing access to land have been by unrestricted grant, though these are rare; short-term loan often for a period of two years and with no obligations in return and; most commonly, open-ended loan. In the last of these, while there may be no formal obligations, a share of the crop will usually be offered at harvest-time. This latter type of loan continues to be the main method of access to land in Mangodara *département*, though it has undergone some changes in recent times.

The main change has been the recent appearance of money-based forms of access to land, such as open-ended loans linked to a one-off payment, offered by herders seeking a sedentary life. This type of transaction is generally carried out in secret and the terms and conditions associated with it are unclear. The cash payment tends to be imposed, sometimes after they have been allowed to settle, the beneficiaries being told they are expected to make a "payment" (the sum is not always clearly stated by the grantor), or they will have to leave. Livestock keepers and their families seem to be particularly subject to such threats of eviction from local people.

Sales of land are localised and remain a minority practice in all parts of the *département*, but the very fact that they exist at all and are probably increasing, represents a major upheaval in the traditional practice.

The first instances of land sales occurred at Mangodara, capital of the *département*, in about 1985, and it is around Mangodara that the practice is most common. The sales identified in the surveys are still restricted

7. This paragraph summarises the main points of the memorandum on the Mangodara area drafted by M. Zongo on the basis of research by K. Triollet and N. Koné.

to the northern area and along the Mangodara-Banfora road. They are the consequence of factors such as large-scale in-migration, the spread of orchard development, and the increasing scarcity and price of land, all of which would tend to encourage people to sell land, but are not necessarily the cause. Other less tangible developments also undoubtedly play an important part, (the personality of customary leaders; the control exercised by the holders of customary rights; whether there is social cohesion or conflict among local people, etc.), as do chance events. Sometimes the death of a customary chief and his replacement by a son less respectful of custom can act as a trigger, opening the door to the possibility of land sales, where this was never previously contemplated.

Where open-ended loans are concerned, the following trends have been noted:

- a reduction in the size of plot granted and careful delimitation of its boundaries;
- limits on the duration of loans;
- the appearance of monetary payments.

New forms of tenure agreement are also beginning to appear, for instance access to land for cultivation in exchange for maintenance work on a plantation of young trees. This arrangement allows someone to grow crops in a new orchard for as long as the trees remain small enough to prevent heavy shading, usually five or six years, and at the same time the effect of crop-growing is to maintain the plantation, and improve it, if fertiliser is used.

Causes of insecurity and ways to provide greater assurance

Sources of insecurity as regards new land transactions

Several characteristics of the new types of transaction mean that they are particularly precarious in the way they affect those acquiring land.

- *ambiguity*: the ambiguous, vague and poorly defined nature of land "sales" means that the acquirer (land user, tenant, "purchaser") is unsure of the rights actually acquired. This is aggravated by the fact that the "vendor" can play on the ambiguity in order to perpetuate the sense of insecurity and retain a wide margin of discretion.
- *secrecy and the unofficial nature of the proceedings:* some land sellers take advantage of the covert, unofficial nature of the proceedings to engage in practices which put the purchaser in a position of heightened insecurity.

- *fraudulent and multiple sales*: sales are often contested when they are undertaken without the knowledge or consent of the customary authorities or other members of the family. This is a major source of insecurity, because there is a significant risk of a subsequent challenge from other family members, which overturns the transaction.

Sources of insecurity for those disposing of land

Where land-owners are concerned, the main source of insecurity is that the "acquirers" may challenge their authority in the matter of who is the real owner. For example, incomers may try to take possession of loaned land by planting trees in defiance of the prohibition, or refuse to respect the custom of bringing annual gifts and "*petits cadeaux*" (token presents). The reason why, in some villages, new settlers take the liberty of planting trees is because they think that, since the RAF was adopted, local people will not feel able to evict an incomer. They play on the common interpretation given to the RAF: "Land belongs to all the people of Burkina Faso", and the consequent sense of powerlessness felt by the locals to assert their customary claims over land.

Sources of insecurity for vulnerable groups

Among local people, the vulnerable groups most likely to suffer from shortage of land include women and young people.

Where incomers are concerned, the introduction of new forms of transaction has greatly increased the number of people seeking to make money from the land rights they can claim. The result is a disorderly and uncontrolled pattern of land-use which takes no account of the potential conflict caused by too-close a proximity of herders and farmers. In many cases, farmers claim that they no longer feel secure on their land because of the continual damage to fields caused by the livestock of a recently settled herder. Similarly, some herders are considering abandoning their encampments because all the surrounding plots of land have been sold to farmers and they are deprived of access to grazing and watering points.

It is also worth noting that, although the introduction of sales and cash payments has encouraged cattle herders to settle, the situation for many herders (especially the poorer ones) is no less precarious, because the pressures put on them to leave are often very strong. Such pressure may come from local customary leaders (who accepted them at some time in the past but now want to install more profitable settlers on the land) or from

newly arrived migrants with greater resources at their disposal (such as migrants returning from Côte d'Ivoire) who can pay for the privilege.

Sources of insecurity relating to traditional methods of access to land

In the northern and south-western areas, repossession of land loaned on an open-ended basis is infrequent, but the ambiguity surrounding the respective rights generates a sense of insecurity for both parties. For recipients, the only way of achieving security consists in agreeing to a contractual arrangement (i.e. agreeing to pay a cash fee, which may increase over time, or making a single "sale-type" payment). Sometimes this change in the way of doing things is imposed by the land-owner. The transition is often gradual and is almost always characterised by a large dose of ambiguity and things left unsaid. Rather than: "I will lease the land to you…" or "I will sell you the land…", he will tend to say: "If you want to stay on the land, you had better give more than before…", or "Now you must pay the value of the customary gifts (chickens for sacrifice or the owner's travel expenses when he performs a ritual) in cash." More often than not, the sum requested is disproportionate, for example 20,000 FCFA for two chickens. There is therefore a large amount of euphemism and concealment in the transition to cash.

Ways of providing security

To guard against the danger of the transactions and arrangements under which they obtained land being challenged, those acquiring land who are worried about their rights can resort to a number of strategies in order to achieve greater security: maintaining good social relations, planting trees (with the agreement of the traditional owner), purchase and, finally, the conclusion of a written agreement. These strategies are not exclusive and are frequently pursued in sequence and combination.

The first two of these strategies are currently dominant, which reinforces the power of "owners", enabling them to control or manipulate those seeking access to land. The other two strategies are just beginning to make their appearance but are very limited, except in the vicinity of the town of Mangodara. Everywhere land-owners show little enthusiasm for a clarification and formalisation of rights. Greater clarity and transparency in the conduct of land transactions would destroy a position in which

they are able to manipulate and take maximum advantage of the existing ambiguity and the sense of uncertainty they can impose on those in quest of land. At present, thanks to the secrecy surrounding such transactions, they can enjoy financial advantages and, in the eyes of the world, retain their traditional roles as landowners, for whom tenure transactions involving large sums of money are normally forbidden. Land tenure systems are therefore in a phase of "hesitation" (Karine Triollet). During this phase, land becomes an issue, tensions relating to land-use increase, bids for and offers of land involving cash begin to appear and are bound to increase, but the transition to new practices has still not acquired "social visibility". The parties involved in new forms of transaction know that the introduction of cash does not cancel out the personal dimension of traditional land tenure practice. The cash component therefore has to remain discreet and is still "embedded" in traditional forms of behaviour. For the time being, a contract governing the permanent disposal of land, independent of personal relationships, is still unthinkable and cannot be publicly envisaged.

Analysis of the different factors involved

Rapid change, diverse situations

In both these regions, change in the methods of access to land has been rapid. Traditional forms of loan have disappeared or diminished (though they are still the predominant practice in the highly-populated Mangodara *département*), while cash-based transactions have become more common. These take two main forms: leasing arrangements and sales. Cash-based transactions are essentially a feature of relations between local people and "foreigners", whether they be incomers of long standing, newly arrived migrants or members of the urban élite. Such arrangements are transacted both in long-settled areas and on the new frontiers of settlement, which shows that this phenomenon is not a direct result of land saturation. Those involved in sale arrangements are mainly city-dwellers and, at Mangodara, migrants returning from Côte d'Ivoire.

Apart from these constant factors, the situations vary enormously. Firstly, between one region and another, the parties involved, the balance of power, the content and the procedures for arranging transactions are very different. But there are also differences within a single area, between *départements*, and even between neighbouring villages in the same *département*. The situations and local tenure practices are very varied because each individual situation depends on specific geographical fac-

tors (closeness to a town, major road or river), the parties involved, and local social relationships (in particular the balance of power between different groups). It also depends on more random factors – the personalities involved (land chiefs, migrants' leaders) and their relationships (a power struggle, or readiness to co-operate, negotiate and communicate) – and on historical factors and particular contingent events (activity of a development project in the area, death of a chief and his replacement by another, etc.). In a long-settled area, it is often the death of the local chief who welcomed the incomers and guaranteed the agreements made in the past that gives the signal for the younger generation to challenge the status quo.

Different strategies for formalising transactions

The demand to have transactions formalised differs from one region and one group to another. Although some parties are clearly keen to have more visible and formalised procedures for transactions involving land, this is not true of everyone. Not all those involved in new forms of cash-based transactions necessarily want them to be more visible and formalised, or to be subject to official regulation. The way in which demand varies according to region can be summarised as follows:

- *Attitudes to formalisation vary according to area, even for actors within the same category*. In the long-settled area (Bama, Padéma), new investors and recent migrants with the resources to buy land are clearly keen to have transactions formalised by a written document or "*papier*", and land sellers are increasingly willing to fall in with this demand. On the other hand, in the new area of settlement in Mangodara region, the same actors do not express this desire because they know that it is not acceptable to land-owners. Therefore, acquisitions have to be made secure gradually, step by step, in accordance with social custom. This done first, by establishing interpersonal relations, then by planting trees, then maybe, at a later state, by written agreement. Asking for a written agreement immediately would be an unacceptable request in terms of building a relationship and the social visibility of transactions. To formulate such a request would be to destroy the quality of the relationship being established, which continues to be the determining factor in stabilising and maintaining access to land. Written procedures regarding land do not yet exist, therefore, except in the vicinity of Mangodara town.
- *Convergence of interest and demand for innovation in tenure practices*

vary from area to area and according to type of transaction. Although young people, land-owning elders and local customary leaders in Mangodara are all happy to see the practice of rental agreements become more wide-spread, they are definitely not on the same wavelength when it comes to sales of land. For lineage elders who own land, a lack of openess is desirable, if not essential, while younger people would like to see a greater degree of transparency (as a means of exercising social control over transactions and associated benefits).

- *Land transactions and all the problems of security associated with them never exist independently of personal relations*. A transaction takes on meaning – and is a source of insecurity or satisfaction – within the context of multiple inter-locking social relations, at a particular time and place, between members of well defined social groups, whose linkages are far more complex, long-standing and varied than one would ever guess from looking at the land register. It is these relationships, taken as a whole, which will determine what is seen as secure or insecure, and what strategies can be envisaged as a way of achieving greater security. Because the process of achieving tenure security is embedded in social relations, there are no simple, blue-print solutions to the difficulties associated with insecure land rights.

It is therefore difficult to propose a detailed series of measures representing "solutions" to different types of situations. It has, in any case, to be borne in mind that the implementation and results from interventions will depend on reactions, strategies and interests of the actors concerned, some of which may be contradictory and unexpected.

The three examples below show the extent to which the interests of different groups can be opposed to one another where the consequences of new tenure practices are concerned.

- In the long-settled cotton-growing area, where sales are becoming common but are still generally transacted covertly and without the backing of a "*petit papier*" or PVP, support for formalisation and clarification of these transactions would be to the advantage of land purchasers, younger people and family members who are absent (or kept in ignorance of a secret transaction). On the other hand, the above measures would clearly be perceived as an unwelcome constraint by the heads of family who engage in such transactions, and by local land-brokers (in particular, when someone from outside the village is

involved in a purchase). Imposing formalisation of these transactions would increase the security of tenure of the former, but would reduce the profits made by the latter.

- The formalisation of leasing arrangements would seem to provide a degree of security for both the land-owner and tenant in places where such arrangements are becoming increasingly common (the long-settled cotton-growing area, saturated village territories, and where power to take decisions about land use is vested at clan level). It is probably also in the interests of the children of local land-owners who are not yet set up on their own farms, because it meets the cash needs of the older generation without permanently disposing of the land which the younger people will need in due course – provided that the older and younger generations of the family are on good terms. This therefore represents a win-win solution for no fewer than three groups of actors. However, facilitating the spread of cash-based leasing arrangements will inevitably have the effect of reducing the stock of land available for free loans between local people. Local people who lack land and cash resources will therefore be penalised in relation to incomers having the resources to lease land (leasing among locals remains for many socially inconceivable). So, in this instance, there are some social categories who will find it advantageous if leasing arrangements are formalised and made easier, but other groups will clearly lose out as the number of these cash-based transactions increases.

- By contrast, in the Mangodara area, where the "founding" customary authorities are still very strong and control vast areas of land, popularising the formalisation of leasing arrangements might well be adopted by some customary chiefs as a way of establishing a modern version of land ownership which is not strictly in conformity with traditional practice. It would also put them in a stronger position to sell a part of these lands at a later date, and avoid the fragmentation of control over land.

Tenure insecurity and new land transactions

Various new forms of cash-based transactions are becoming increasingly common. They facilitate the circulation of land rights, particularly between customary land-holders and people from outside the local community. As stated earlier, the nature of land claims arising from these new cash-based transactions are often ambiguous and uncertain, whether they be rights of use deriving from open-ended loans, leasing arrangements or

other forms of temporary transfer of rights, "sales", "disposals" and transactions tantamount to a sale, etc.

We can distinguish three characteristics of new transactions which make them unclear and can lead to disputes: uncertainty as regards the rules that apply, ambiguity in communication relating to them, and their covert nature.

(a) uncertainty as regards the rules that apply, appropriate authorities and the content of land transfers:

- uncertainty as regards the authorities who should arbitrate disputes, punish those engaging in unauthorised practices and define the regulations governing transactions;
- uncertainty about the rules and regulations defining what types of tenure agreement are deemed socially "acceptable";
- uncertainty concerning the content, terms and conditions of the exchange.

This uncertainty is focused particularly on the following questions:

- what rights are assigned by a particular transaction?
- what legitimate grounds are there for challenging or redefining the terms of long-standing agreements?

(b) lack of clarity and ambiguity as to the terms and conditions of the agreement between parties. For instance, some sales are formulated in terms of a "grant", which leaves the effective content of the transaction vague.

(c) concealment and lack of social visibility of transactions.
Concealment by the land owner of money-based transactions with parties from outside the village is another common cause of misunderstanding. The lack of openness also tends to strengthen the role played and power wielded by intermediaries, exaggerates the effects of inequality of information, and encourages manipulation and deception.

These three characteristics contribute to a widespread climate of uncertainty, which is experienced and described by many of the parties involved, in particular customary elders, as an "absence of landmarks". No longer are there clear limits and reference points defining what is permitted and acceptable where land transactions are concerned.

3. Ways of ensuring the security of transactions in a context of unstable regulation

In this situation, is it possible to find answers to the problems experienced by the parties involved? In some circumstances, formalising transactions would seem to be a way of reducing the associated insecurity. This explains why people are increasingly, though not always, seeking a written agreement. But we have seen that agreements on paper, as currently practised, do not fully ensure the stability of the arrangement. Moreover, not all actors seek this kind of clarification.

We believe that, in certain circumstances, public intervention is both possible and necessary in providing greater security in respect of land transactions and, more generally, the land tenure situation in a rapidly changing world. It would satisfy the requirements of some of the actors, while providing a secure legal framework would make it possible to reduce the current gap between actual practice and the formal legal position. Below, we propose general guidelines and practical recommendations to achieve this end.

3.1 Agricultural investment and local social harmony go hand in hand

Our recommendations are based on the assumption that the principal challenge presented by changes in land tenure in this region is to reconcile two fundamental and interdependent aspects of sustainable rural development:

- **an economic objective:** agricultural investment and an increase in rural incomes through intensification and diversification;
- **a social need:** cohabitation between different social groups.

In other words, the general purpose of intervention to "regularise" what are currently informal transactions would be to achieve greater compatibility between the growing circulation of land rights, agricultural investment, and cohabitation among different social and ethnic groups. To reconcile these objectives, it is necessary to clarify "the rules of the game",

knowing that the desired stability will inevitably be limited and difficult to achieve in a period of structural transition. The changes will never be entirely harmonious and very probably there will be winners and losers in the short and medium term. Realistically, proposals to intervene have to encourage compromise and facilitate communication and negotiation where interests are in conflict.

It is not the aim of our proposals to define new legal texts, nor an institutional apparatus to manage land transactions once the wider changes now taking place have been largely realised. It is rather a case of examining the role of local actors, the state and development projects, in supporting peaceful change during this first phase.

What we see today is a rapid increase in supply and demand for land in exchange for money. This being the case, we start from the principle that transparency is preferable to secrecy. Visibility and explicit regulation of new forms of land transaction offer a better solution for society as a whole than the continuation of largely covert and unregulated land deals. At present, such transactions are determined above all by the relative strength and guile of actors having different degrees of power, knowledge, information and wealth. In other words, to paraphrase J. Attali, "the free market without institutions is a jungle ". *The problem is to know when, how and in what circumstances institutions that promote the visibility and regulation of transactions can best emerge.*

Lending support for the emergence of clear and effective reference points in land matters, to guide the behaviour and interactions of the actors concerned, is not a task to be taken on lightly by development projects or more technical initiatives. Nor is it something that can be achieved by legislation alone, given that law is only partially and sometimes unpredictably applied. The widespread legal pluralism and existence of multiple channels through which land rights are contested and disputes resolved has helped break down customary practices and institutions, thereby inducing change. However, it has not created a new and effective regulatory framework which can provide security for the majority of land transactions.

In these circumstances, the main issue is not whether to apply the legal texts of the *Réorganisation Agraire et Foncière* (RAF – Agrarian and land tenure reorganisation), but rather *how to reconcile investment and social cohabitation*, without fundamentally contradicting the spirit of the

reform. It is also vital to ensure a socially sensitive transition to a future situation in which three processes interlink more effectively:

- money-based land transactions ("sales", leasing arrangements) which are becoming more common and openly practised;
- written agreements (backed first by "*petits papiers*", then by more formal legal measures) becoming easier to obtain and more openly engaged in; and
- the law, to incorporate measures and concrete arrangements for organising transactions and making them more accessible.

3.2 Proposals to guide future land transactions

In response to the major causes of insecurity identified earlier, the general approach is to support the following processes:

- the evolution of a socially accepted way of regulating the circulation of land rights at local level;
- promoting local debate to clarify "landmarks" indicating what is acceptable in the practice of tenure transactions;
- formalisation of transactions at a pace suited to demand and expectations, in accordance with the situation pertaining in each area; in order to encourage
- a gradualist approach in which the law can start to play a more effective role in disciplining land transactions.

Let us try to spell out these four proposals in more detail.

The evolution of a visible and socially accepted way of regulating the circulation of cash-based land rights, where this is increasingly practised.

Where "sales" of land are increasingly common, it is desirable that these practices should quickly become legitimate and visible, rather than something shameful and covert. Only in this way will the transactions in question gradually become subject to social and institutional regulation, and hence more explicit and visible. The aim is to recognise that permanent disposal of rights over land exist, and constitute explicit transactions, carried out in accordance with relatively standardised procedures. This represents a social transition, in which land transactions are tending to lose their character as reflecting personal relations and become defined on a contractual basis. This represents a change in mentality, practice, social

relations and view of the world. So significant a social change cannot be forced, but it can be facilitated by appropriate local initiatives on the part of state services and their representatives.

Explicit clarification at local level of what is accepted as correct or not permissible, where land transactions are concerned.

One cause of tension is the lack of shared reference points, which cannot be imposed from above. They must be defined at the grass roots, with the possibility of different decisions being taken between one village and another, and one region and another. What is not acceptable at a given time may become legitimate a few years later, as ideas and practices evolve. The aim of this sort of clarification is to redefine such norms – for a given time and place – indicating what is permissible and acceptable in land matters.

This can be achieved at two levels, by two complementary procedures:

- *at community level* (village; group of villages; *département*)

Here we propose setting up a "forum"[8] which consists of organising public debates, in which the parties concerned spell out what rules they will accept. The ways in which this is done may vary; the important thing is that it fosters an open debate, involving all groups, that its starting-point is the actual practices and recognised principles of communal life, and that it facilitates the negotiation and formulation of rules accepted by the majority. This procedure will require leadership and fostering of grass-roots communication in order to promote dialogue on changes and new issues in the field of land tenure. This can only be done by experienced people able to communicate in the local language, acting with the support from representatives of the administration.

- *at the level of the government administration (Préfets, Hauts-Commissaires)*

The main problem that arises here is that the "rules" or principles defined in prefectorial or provincial orders are often forgotten once the state official who expresses them has been moved to a new post.

The activities of the administration and related political discourse can obviously foster the emergence of the desired reference points and norms

8. Le Roy E., Bertrand A. and Karsenty A., 1996, *La sécurisation foncière en Afrique*, Paris, Karthala.

and make them credible, provided certain conditions are met. Administrative activity must be "top-down", easy to read or listen to (declarations broadcast over the radio), consistent with the approach of the courts, and sustained over a period of time.

Box 1 Promoting sustainable structures for land tenure regulation: an example

In Kouka ***département***, a committee responsible for settling disputes over farm land was set up by the Préfet in 1994: "For two years, under the chairmanship of the Préfet, it arbitrated settlements which were accepted by the various parties… After the Préfet's departure, the committee, though it continued to exist legally, stopped meeting. (...) This example shows the unstable nature of such local institutions...".[9] The future Commissions Villageoises de Gestion des Terroirs (CVGT – Village land management committees) could well be the right environment for a sustainable mixed structure of this kind to deal with land tenure issues. We also need to learn lessons from the activities of departmental courts, where they operate.

"Existing examples (...) demonstrate that good co-operation and understanding between the Administration and village structures is the best way forward where land tenure regulation is concerned". (Paré and Thiéba, 1998: 118). The disadvantage with this formula – the authors continue – is that this type of relationship can rely heavily on the personality of the administrator. Until something more effective and formalised is found, we must therefore try to make this complementary relationship more stable and independent of the personalities concerned and properly integrated into the duties of local administrators.

Stability does not mean that something is for all eternity: a clear message from the government, reiterated every 5 to 10 years, can serve as a powerful incentive, sufficiently credible to encourage "new ways of doing things" where money-based land transactions are concerned, which would be of great value to all.[10]

Some formalisation of land transactions (sales, leasing arrangements, loans) at two levels:

- firstly, *formalisation of the transaction between the parties directly concerned* (including, on the vendor's side, any rights-holders belong-

9. Paré, L. and D. Thiéba, 1998.
10. Cf. the well-know example of the principle "the land belongs to those who develop it" in Côte d'Ivoire, in the 70s and 80s. This principle, expressed in a speech by President Houphouët-Boigny, was effectively understood and translated into reality, though it was never formulated or confirmed in any legal instrument.

ing to the vendor's family) at the local level. This can be achieved by means of "*petits papiers*", but preferably in accordance with an agreed formula, possibly using a standard form and involving witnesses;
- next, *"validation" by representatives of the state, if not of the transaction itself then at least of a declaration whereby the parties state that they have agreed the transaction between them*, in a given way, with certain persons as witnesses.[11]

The same principle applies to all the different forms of "new transaction". However, a greater degree of formalisation and validation is needed in the case of sales. As they commit the family group to a permanent transfer of rights, they call for a more rigorous procedure requiring the approval of the group, validation of the transaction by a legal authority (*Préfecture* or municipal authority), and a proper record of the transaction. For leasing arrangements, a private contract or deed, possibly validated by the village administrative authority, may suffice, at least in the initial phase.

In the case of sales, a *Procès-Verbal de Palabre* (PVP) of broader scope, drawn up and thus verified by the signatories and countersigned by the *Préfecture* (which would keep a copy), could become the instrument for achieving the required formalisation and a simplified procedure for registering transactions, which would also be in conformity with the RAF.[12]

The involvement of the administration, possibly with backing from development projects, can support a simplified process for registering land transactions in several ways:
- by facilitating and disseminating information about the means and incentives to formalise land tenure transactions;
- by standardising formalised agreements so that they conform to a straightforward model or series of models, comprising a number of basic components and options;

11 This is the "*certificat de notoriété*" formula adopted by Bourgmestres (village headmen) in Rwanda and by Cadis (Muslim authorities having a public function) in the Comoro Islands. In these situations, the local authority issues a document attesting that the persons concerned have declared (before the authority in question) that they have concluded an agreement or transaction by private deed. The authority issuing the certificate does not pronounce on the strict legality of the content of the agreement. See the document "*Formalisation des contrats et des transactions. Repérage des pratiques populaires d'usage de l'écrit dans les transactions foncières en Afrique rurale* " (coordinated by Lavigne Delville and Mathieu, 1999) for a presentation and more detailed discussion of these practices and their effects.

12. The term "registration" is used here in the ordinary sense of "keeping a record of a declaration" (in this case, a record of a transaction performed by private deed), not in the technical or legal sense of registering land tenure rights.

Box 2 The Procès-Verbal de Palabre (PVP)

At the present time, the PVP is the document most commonly used in the countryside for recording a land tenure transaction. There is nothing new about it, having been provided for in Law no. 77-60/AN of 12 July 1960, governing State-administered land. The PVP was already used by the State authorities themselves as an initial procedure to purge land of traditional rights prior to the registration and incorporation of a plot of land into the State domain. The main purpose was to ensure that the customary authorities agreed to the land being incorporated in this way. This prior cancellation procedure was practised, in particular, before the building of housing estates on the fringes of towns, or before large-scale development operations in the countryside.

With the advent of the RAF in 1984, which affirmed the State's ownership of all land, the government thought it could dispense with the need to obtain prior agreement from customary leaders. However, the practice of drawing up a PVP has been maintained by private individuals when negotiating the purchase of customary land, as proof that all parties agree to the planned disposal.

When the RAF was revised, in preparation for the current version (dated 1996), the PVP was reintroduced into the regulatory procedure as a step in the process of making an application for rural land. The law thereby came back into line with actual practice, while seeking to strengthen the credibility of the legal text. According to the RAF (art. 184, D., RAF), the PVP records "the agreement of the tenants of the surface" (i.e. the parties to the transaction) to the occupation of the land in question; it is drawn up by the state lands department and signed by the competent administrative authority for the area (in practice, the *Préfet* or *Haut-commissaire*). Despite the precautions taken to strengthen its credibility, legally the PVP does not establish proof of ownership, but rather constitutes an administrative document.

Despite attempts at reconciliation made when the RAF was revised, one is again aware of a gulf between observed practice in the field and the provisions of the law. In practice, the parties tend to draw up a PVP directly between themselves, then have their signatures certified by the *Préfet*. The applicant may subsequently seek to regularise his rights to the land by fixing boundaries, registering the land and applying for a permit providing a legal basis for his rights to occupation and use. Many people regard the PVP as giving them rights of ownership.

The practice whereby the parties draw up a PVP directly between themselves is more realistic, considering the very limited degree to which the State lands department is represented in the countryside. The parties would at best have to go to the provincial capital just to draw up a PVP. However, there are no legal grounds for regarding the PVP as establishing property rights. It has to be seen as a document of intermediate legal value, establishing a right to request registration of the rights recorded in it, through a process leading ultimately to a formal state-backed title.

- by regulating transactions which conform to the desired basic "model" to make them more secure, while transactions which are ambiguous, covert and unformalised are penalised in the event of a dispute.

To provide support for the State to regulate this innovation, it is also necessary to strengthen their capacity to manage written information. PVPs and other written records of land transactions need to be checked and kept on record. In the first instance, the validation of formalised transactions can only be performed by the locally-based state administration, which the local community knows, recognises, listens to and respects, i.e. the *Préfet*. When the practice of formalising land transactions grows beyond a certain point, the resources of *Préfectures* will need to be increased.

A gradualist view of the role of law

At the present time, most *Préfets* assert that the RAF is unworkable and is not applied in the strict sense, except in a few locations and on an *ad hoc* basis, mainly in the vicinity of large towns (Bobo-Dioulasso). Treated by all the parties concerned as a variable and *ad hoc* point of reference, the law is nevertheless playing a growing role in structuring actual practice. This role depends on the way it is interpreted by the local administrator and other local sources of authority in managing tenure problems. From this point of view, it is clear that the law is seen by local communities, and everyone else concerned, as just one factor in a far richer fabric of the regulations, relationships and institutions relating to land.[13]

Nevertheless, the effective provision of security in land matters can only be achieved within a state-organised framework. Our approach is therefore to take the law into account, while recognising that its impact depends entirely on the way the different actors (including state officials) react to it. At the same time, in a situation where the letter of the law is not applicable for most rural dwellers, the objective is to construct intermediate arrangements which "fill the gaps" left by the law. By offering pragmatic but legal solutions which are relevant to the real-life problems experienced by different actors, and accessible to all, such arrangements encourage the various parties to move towards state-sponsored legal solutions, and facilitating access to procedures for registering title to land, for those who so wish.

13. For example, the law is invoked mainly by incomers, and in areas where cohabitation has caused stresses and strains for a long time (the old cotton-growing area). These people have recourse to the courts claiming that since "the land belongs to the State", the local land chiefs have no say in the matter; in particular they have no right to apply customary principles whereby newcomers will always continue to be trapped in a social relationship of dependency.

From this point of view, rather than strict and full application of the law, the aim would be to work for a gradual convergence of social norms and practices with the legal provisions, in the strict sense of the term. Pointing people towards certain principles and tools found within the RAF would seem to be a good approach.

Nevertheless, the RAF is not the only legal instrument relevant to the issue of land tenure security. The issue needs to be situated in a wider legal environment (what lawyers call judicial organisation) in which all legal relationships are made subject to a body of general principles. So, for instance, while being of lesser weight than an official record (*acte authentique*) drawn up by a competent public official,[14] a private deed (*contrat sous seing privé:* a written document drafted and signed by the parties without the intervention of a public official) is recognised in the Civil Code of Burkina Faso. The Code also recognises as "initial written proof" documents of any kind (even a straightforward letter) which lend credibility to the matter alleged. Moreover, the Civil Code also allows for the use of a witness's testimony to prove a legal deed when "initial written proof" exists (Art. 1347). Therefore, without any changes to the law, the "*petits papiers*" signed when land transactions are concluded can even now, despite their imperfections, be recognised by the State and the courts in land matters.

3.3 The role of local administrators

If it were necessary to apply the RAF, the whole RAF and nothing but the RAF, in resolving land problems and disputes, it would soon become apparent that this law is often inadequate or difficult to use as it stands. On the other hand, the law functions as a point of reference and expression of unity for the country as a whole. One pragmatic option for how the RAF might be systematically applied to new money-based land transactions, would be to validate clearly the role of local administrators (*Préfets*) in encouraging and achieving the formalisation[15] of transactions at local level, taking into account local circumstances.

This approach would appear to be most desirable in areas where commercial-type transactions are increasing rapidly and when the parties do not feel at home with formal procedures, (such as application for title to land

14. i.e. a notary, court clerk, bailiff, registrar…

15. See note 11 in this respect. What we understand by "pragmatic formalisation", on the lines of the Rwanda example (1980-1994), is discussed in detail in "*Transactions informelles et marchés fonciers émergents en Afrique* " (Mathieu, 2001).

which involves very slow and costly procedures). These concern circumstances where State intervention in land tenure matters is currently a matter of urgency but very delicate.[16] In these areas, a message from the State would be beneficial, making it clear that a simplified written formalisation of land transactions, under the aegis and supervision of the local administrator, is now a permitted and officially approved "way of doing business", in order to reduce the risk of conflict, particularly when new forms of transaction are envisaged (sale of rights, leasing arrangements) and when one or both of the parties to a transaction desire that it be performed in this way.

Box 3 In the case of sales, these principles could be formulated as follows:

When the parties to a non-customary transaction have not engaged in formal legal procedures, the normal way of doing things, encouraged by the administrative authorities, should be as follows:
(a) spell out of the content of the transaction;
(b) ensure the presence of witnesses (neighbours, chief's representative); obtain the explicit and formal agreement of the family in the presence of an external "witness representing the administration" (the RAV) who records on a simple form the details of the persons present and the fact that they have given their agreement;
(c) draft a written document, even if this is only a document drawn up "in the local fashion" intended to reflect the visibility of the agreement and the duly attested approval (witnesses, signatures) of the members of the grantor's family;
(d) have the document in question, transmitted by the parties and signed by the RAV in his capacity as "witness", certified (rubber stamp) by the administrator (*Préfecture*) as having been properly submitted by the two principal signatories to the transaction, and having been properly drawn up in the presence and with the agreement of the other persons who have signed it as witnesses, their presence having been attested by the RAV;
(e) it is also strongly recommended that a description of the physical boundaries of the plot concerned (hedges, boundary markers, etc.) be included.

However, this is not feasible everywhere and it will only work in certain areas and under certain social conditions.

16. The political decision itself (which it is not the purpose of this study to discuss) should logically involve the Ministry for Territorial Administration and the Ministry of Agriculture, in conjunction with the State Property Administration.

The core of the message, which could be broadcast through administrative channels or via the legal system, is that, in the event of "a grant of land" being made outside normal customary procedures (especially in the case of sales), the existence of a clear document will constitute an initial proof, if, and only if, the document in question is drawn up in accordance with certain basic principles:

- following consultation and with the explicit agreement of adult members of the family concerned;
- in the presence of a "neutral", third-party witness (i.e. someone not involved in the transaction itself) who is recognised as reliable by the government administrator to play this role impartially and disinterestedly.

In particular, the function of this "validating witness" is to verify publicly the presence and agreement of the different family members, to check that the content of the document accords with what was agreed orally, and that the persons signing the document are those entering into the transaction. Conversely, in the absence of a document of this kind countersigned by a witness and the family members holding the underlying land rights, in the event of a dispute, the administrative authorities and the courts will judge that no valid proof of the transaction has been provided. In other words, in the absence of a document attesting to its social and family visibility, the transaction would be regarded as socially illegitimate and formally unlawful.

By affirming these principles and taking them into account in actual practice, particularly when called on to arbitrate in disputes before the courts become involved, the local administrative authorities will be playing a decisive role in promoting local dialogue and clarification of land tenure practice, and in encouraging the establishment of simple, clear and appropriate administrative case law.

3.4 Concrete initiatives

There are several possible ways of encouraging the clarification of land tenure issues and the formalisation of transactions. Their aims include to provide information and promote dialogue at the local level on the necessary changes in land tenure practice and regulation, and to encourage the representatives of the groups concerned to negotiate, if necessary, in situations where competition for land is a problem.

Providing information on land tenure matters

Clarifying the land tenure situation requires that all parties have the same information. Plans to inform and communicate with people are therefore necessary. These should cover the legal provisions governing transactions (PVP, conditions for the recognition of "*petits papiers*" and "initial proof of a right"), the relevant policy guidelines, the responsibilities of the administrative authorities, the measures being taken to encourage the formalisation of transactions and, once the practical arrangements have been defined, the forms of standard contract and the procedures for drawing up and validating such contracts. Examples of arrangements negotiated and settlements arbitrated locally will also help to show how pragmatic answers can be found, and to establish a body of case law.

Negotiating the rules of the game and defining legitimate practice

One factor in clarifying the land tenure situation is the need to establish which rules or principles are recognised as legitimate in a given area. If they are to be socially legitimate and legal, such rules must fit with local circumstances while being recognised by the State. Negotiated arrangements already exist in places where customary chiefs and incomers' leaders share a concern for maintaining social harmony, such as the case of one village in the Bama-Padéma area. Negotiations of this kind should be encouraged. It is also possible to organise meetings bringing local figures and representatives of the government administration together in dialogue. The active participation of the administration is necessary, both as a reminder of the framework within which the negotiations are taking place and therefore the conditions for State recognition, and to validate the agreements arrived at.

Formalising new transactions and drawing up contracts

The purpose of this activity is to encourage the clarification and formalisation of transactions, while ensuring that the process is not unfairly "hijacked" by particular groups to the detriment of others. Working within the framework defined by the State and starting from local negotiations, the need is to define more precisely the procedures for drawing up and validating contracts; to define standard contracts that could be used in a given situation; to provide the actors with the tools they need (forms, information leaflets on the conditions of validity of a contract and the

way it should be drafted, etc.); and to support them in drawing up their own contracts. Making transactions secure thus depends on:

- clarification of the content and the different clauses;
- establishing procedures for drawing up the contract;
- establishing the way in which the contract is validated.

Box 4 Formalising… as a way of giving more choice to the parties involved

An analysis of "*petits papiers*" shows that the parties do not always spell out the various clauses of the transaction clearly enough, leaving room for different interpretations at a later stage. Standardising the content of contracts makes it easier to draft them, easier to get the parties to clarify their choices (for example, "are we talking about a sale in the true sense, or the granting of rights of use over the lifetime of one or other party?") and easier to ensure that a certain number of essential clauses (duration; terms and procedures for renegotiation, etc.) have been discussed between the parties, because they are mentioned in the contract.

It might be possible to offer a range of pre-drafted standard contracts, which would be easy for the parties to complete. The purpose of standard contracts is not to fix practices rigidly by confining them to a few conventional types (lease, share-cropping, sale). On the contrary, the objective is to leave the parties free to define the arrangements they want to establish between themselves, while ensuring that a certain number of crucial points regarding the content of the transaction have been dealt with and made explicit.

This kind of standardisation will only be relevant if it is accompanied by a sufficiently broad range of types of contract, corresponding to the range of local practices which are deemed legitimate. So, for instance, for a "grant", it would be necessary to offer a range of contracts or possible clauses to address:

- alienation: are the rights of ownership being disposed of? Will the land cease to be part of the heritage of the group disposing of it?;
- lifetime rights of use: the property itself is not alienated; the rights acquired cannot be passed on to the recipient's heirs, nor assigned to a third party; but can the land be repossessed, if a compensating sum is paid and a minimum notice period given?; can the land user plant trees or make other permanent improvements to the land?

It is vital to start from a clear description of the content of a transaction, so that there is no ambiguity as to the clauses. Even when used locally, general terms such as "sale", "grant", "lease" should be avoided, since they tend to be open to more than one interpretation. Sufficient diversity is necessary if the actors are to find the form best suited to their needs, even though the range may be reduced subsequently, either spontaneously or by political decision. Definition of the possible forms starts with those which exist already but may also result from a political decision as to which forms should be given priority and granted legal recognition.

In any case, room must be left for specific clauses freely negotiated between the parties, to allow for adaptation to local conditions and the parties' particular wishes.

Box 5 A concrete measure: popularising the procès verbal de palabre

For long-term grants of land, the PVP, standardised and popularised with appropriate information and training, could become a good basic tool for formalising transactions, as part of the process outlined above.

As well as providing encouragement to engage in negotiation over land matters (supported by visits and discussion groups), a project to ensure land tenure security will also need to promote simple formalisation models, which are administratively acceptable and can easily be validated. Such model contracts, once negotiated by the parties, could be presented as a form of PVP therefore in conformity with the RAF, and, as a private deed, can be validated and archived at the *Préfecture*.

Certain improvements can be made to the PVP, as used today, to give it a standardised and widely disseminated form, terminology and power to provide security. Its significance in providing security needs to be carefully defined from the outset at national level, ideally by an inter-ministerial technical team, to ensure that what the authorities say is consistent, sustained over time and legally solid. The PVP could then be seen first as initial proof of a land tenure transaction by private deed, and secondly as the prior and necessary step towards the formal procedure of obtaining title to land ownership in full legal form, provided for in law, should the person acquiring the land then wish this. Between the PVP and formal land titles, there is therefore no contradiction. The former does not replace the latter but rather complements and gives access to it, the formal title of ownership being something which not everyone will want or be able to acquire.

Bibliography

Lavigne Delville, P. and P. Mathieu (co-ordinators), 1999, Formalisation des contrats et des transactions. Repérage des pratiques populaires d'usage de l'écrit dans les transactions foncières en Afrique rurale, GRET/IED-UCL, Paris, Louvain.

Lavigne Delville Ph., forthcoming, Les pratiques populaires de recours à l'écrit dans les transactions foncières en Afrique rurale. Eclairages sur des dynamiques d'innovation institutionnelle, Working documents of the UR REFO, IRD, Montpelier.

Le Roy, E., 1995, La sécurité foncière dans un contexte africain de marchandisation imparfaite de la terre. In: Blanc-Pamard, C. and Cambrezy, L. (Eds), Terres, Terroirs, Territoires. Paris: Orstom (coll. Colloques et Séminaires), pp. 455-472.

Mathieu, P., 2001, Transactions informelles et marchés fonciers émergents en Afrique. In : Benjaminsen, T. & C. Lund (Eds), "Politics, Property and Production in the West African Sahel. Understanding Natural Resource Management". Uppsala: Nordic Africa Institute: 22-39.

Paré, L. and D. Thiéba, 1998, La sécurisation foncière. Leçons d'expériences au Burkina Faso. Report for the Netherlands Embassy. GREFCO, Oct. 1998, 137 p.

Paré, L. and B. Tallet, 1999, D'un espace ouvert à un espace saturé – Dynamique foncière et démographique dans le département de Kouka (Burkina Faso). Espace, Populations et Sociétés (1999), 1 : 83- 92.