Land tenure in evolution: access to natural resources in Africa

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Introduction

Africa is an outstanding example of the statement "no land, no food". Access to land, water and forests was, and still is an important and in fact critical condition for the production of food and forage for human and animal consumption. Till the beginning of the seventies, Africa was commonly considered as a continent which, thanks to the abundance of land and to the flexibility of the indigenous land tenure institutions, did not face serious land tenure problems (Platteau 1991: 3). However, under the influence of unbalanced agricultural commercialisation, rapid population growth and many other more or less recent developments, large regions of Africa and particularly the Sahel, are now experiencing scarcity of fertile and arable land, often leading to competition and (sometimes violent) conflicts. While technical innovations and economic incentives for a more sustainable management of natural resources in the Sahel always received a lot of attention, it is only recently that the international community has come to regard the question of the complex legal and institutional aspects of land tenure as a crucial one for the survival of Sahelian people.

The aim of this article is to make some preliminary observations on land tenure in Africa in order to get more insight in the social complexity and changing nature of land arrangements in rural African societies with emphasis on the Sahel.

In the first section I will summarily deal with the concept of land tenure in general, broadening it to a more comprehensive approach of the management of natural resources. The second section gives a short sketch of the so called traditional or customary land tenure in Africa ending with a description of the local land tenure among the Wolofs in Senegal. In the third section the developments and problems of the policy on management of land and natural resources will be placed in a historical context. Finally, in the conclusion, the relative effectiveness of legislation for developing new policies on the management of natural resources and the need for more creative legal solutions will be discussed.

Land tenure and the management of natural resources

What is land tenure? Land tenure may be thought of as a system of rules and norms governing the relations between humans and land. It specifies whom is to get access

to land at which time and in which place. (cf. Reyna and Downs 1988: 9; Lane and Moorehead 1995: 116-117). Such rules and norms can be written or unwritten. They can be found in the sphere of government, as with laws that define the circumstances under which a piece of land can be expropriated. They can also exist in the private sphere, as when two or more people strike an agreement involving a parcel of land. Land can be sold, lent out, rights to use it can be granted, and so on.

No separate term for land tenure exists in the Dutch legal system. In our capitalist society, land is something just like a house, a tin of fish or a share of stock. It is a marketable commodity, and various legal codes treat it as such when they regulate what can and cannot be done with such a commodity. Land is scarce in the tiny, overpopulated Netherlands, and the rights attached to land have exceptional force under the Dutch legal system - ownership of a piece of land is a fact to be heeded by all, and therefore all must be aware of it. For these and other reasons, all rights to land in the Netherlands are recorded. If you want to know who owns a certain plot of ground and what other rights might adhere to it, you can apply to the land registry, whose contents are public information. Someone who owns a piece of land has the most comprehensive rights to use it (e.g. to live on it), to reap its benefits (e.g. to rent it out) and to dispose of it (to sell it or give it away). That may sound absolute, but sometimes little remains of this absolute right in practice. One reason for this is the steady expansion of government intervention into many areas, especially when it comes to scarce commodities like land.

These brief remarks about Dutch law were necessary to help me clarify certain issues in land tenure in Africa. For legal experts from Africa and for others who deal with African law, land tenure is a familiar concept. In former French colonies it is referred to as *droit foncier* or *droit de la terre,* and in English it is sometimes called "land law". In Africa, land tenure is regarded as an independent object of study, for several reasons.

In the first place land is a crucial means of production in Africa, with the majority of people still living - or at least trying to live - from the produce of the land. Second, in most places in Africa a complex network of unwritten rules and behavioural codes exists which governs the relationship between the people and the land. A third reason is that the French colonial administrations (just as the Portuguese and British ones elsewhere) made extended attempts to either ignore such systems of customary law and replace them with French (or other Western) law, or else to integrate them into a Western system. This spawned its own specific problems everywhere. A fourth reason is that land has been regarded since independence as a key developmental resource everywhere in Africa, and that has resulted in land reform programmes in many countries.

Although these introductory remarks were mostly from a legal perspective, land tenure in Africa has important sociological, political and ecological components. For a long time, research on African land tenure confined itself to the access to land for agricultural activities (and, to a lesser degree, access for residential purposes in cities and villages). Until a few years ago the issue was regarded as an interesting hobby for legal anthropologists, who uncovered the relationships between kinship, marriage and land ownership in prolonged, in-depth village studies.

In the past 10 to 15 years it emerged that many rural development projects in Africa were failing to produce the desired results. Among the main factors that have been blamed for these failures were:

1. insufficient knowledge of local systems of land tenure (cf. Van Dijk 1996: 17)
2. the role of African governments, which regard land as state property but have been unable to ensure it is managed properly (Le Roy 1990; Von Benda-Beckmann 1991: 77).

In addition, the African physical environment - as a consequence of a whole range of factors (drought, population growth, poor management) - has deteriorated to such an extent that the survival chances of large segments of the population are in jeopardy. Aware of these factors, development organisations in particular have become aware of the urgent need to

1. become more familiar with the local land tenure systems before implementing projects;
2. understand land tenure in a broader context.

It is no longer enough just to know the land tenure systems as they apply to agriculture. To restore the quality of the environment (including that of arable lands) we need a comprehensive approach that includes

- access to and management of pasture lands
- access to and management of water (for human consumption, for livestock, horticulture, irrigation, fishing)
- access to and management of trees and forests.

Figure 1 shows three hypothetical villages and the various local natural resources on which the inhabitants of the three communities have to rely for their living. The resources within these communities are used for different purposes by different people at different times. The users of the same resource may be different

depending on circumstances, seasons or the nature of the resource itself and the nature and extent of the rights which may be exercised over a resource also vary. Access to a farmland may be restricted to the only members of a family, but sometimes access may be offered to passing herds in periods the field is left fallow. Some trees are free for the use by all, but the use of trees for commercial purposes (e.g. fruit-trees) is generally restricted to the owners of the tree. Overlapping and interlocking claims and responsibilities are the essence of African tenure systems. (cf. Shipton and Goheen 1987; Thébaud 1995).

Access to land and other natural resources in Africa is largely determined not by what the law says but by power relations. Social, economic and political relationships determine to a large extent who can access natural resources, when they may do so, and how far their rights extend. And because all these types of relationships in Africa are in a considerable state of flux, the rights to land and other natural resources are also being transformed.

I have pointed out that the role of the state has proved crucial in the management of such resources, and a key issue at present is therefore who should bear the final responsibility for that management (cf. Platteau 1991).

- Does it rest on the state?
- Should land, water and forests be privatised to encourage private investors to make more and better investments?
- Or can a middle course be found, based on co-management between the central government and local communities?

Most Sahelian countries have opted in principle for the third solution. Even the World Bank, hitherto an avid proponent of privatisation, has slowly but surely begun to support this solution.

Before I go on to examine the potential legal and institutional solutions to the problem posed by natural resource management in Africa, it seems wise to make a few general observations about the so-called traditional land tenure in Africa, and about developments that have occurred, notably in the legal sphere.

"Traditional" land tenure

Just as many preconceived notions exist about Africa in general, there are also many preconceptions about traditional African law. Such ideas are not confined to ordinary people, who depend on newspapers and television for their information, but they are also held by people who deal with Africa professionally.

People readily speak of *African* customary law, of *the* traditional land law system, as though that is the same everywhere in Africa, as though a uniform legal

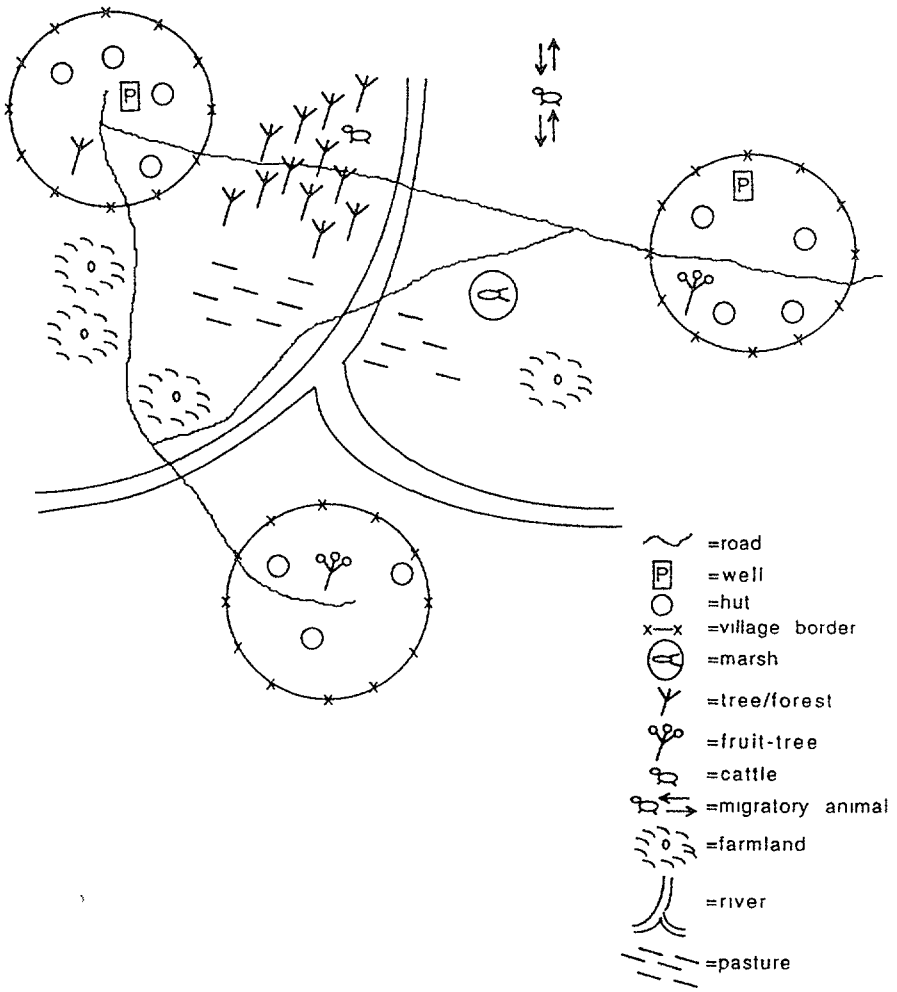

Figure 1. Natural resources at a local level.

system exists. Furthermore, people tend to think of customary law as being static and immutable - some sort of fossil from the precolonial period. Both such ideas are simplistic, but that is usually the case with preconceived notions. In all African countries one still encounters a wide variety of customary law systems today which apply to land and other natural resources, and there can be remarkable differences between them. In addition, in large parts of Africa the indigenous systems have been influenced by elements of Islamic law, modern state law and "project law" (normative regulations for target groups generated by development projects; see Thomson 1987).

The presumed static nature of customary law needs considerable qualification as well: "Often an important customary rule turns out to be only a generation old." (Bruce 1988: 35). Precolonial legal systems have been encapsulated bit by bit within the legal, political and economic structures of the colonial and postcolonial societies. In the process much has been lost of the religious, socio-economic and political systems on which the indigenous legal systems were originally founded. In a positive sense we can also see that systems of customary law often manage to respond dynamically to the changes that African rural communities have been undergoing for centuries. It is hence impossible to speak of one uniform system of customary law applying to land and other natural resources. A broad diversity exists, both historically and geographically.

Restricting myself briefly to land law, I might point to two other interrelated preconceptions. It is often assumed that in Africa no land ownership exists, only collective property. And it is also thought that traditional rights to land are vague and that this is conducive to legal insecurity and speculation (Bruce 1988: 35). On the basis of these beliefs it is then argued that traditional land law forms an obstacle to modern economic development (see especially Feder & Noronha 1987). Such arguments are liberally used by African lawmakers, among others, to demonstrate the need for land reform.

Although we thus cannot speak of one single system of customary land law, it is possible to identify several common characteristics of what I shall henceforth call local land tenure.

1. Local unwritten land tenure is closely related to the social system, which is organised predominantly on a kinship basis. Kinship and land have been called the pillars of traditional African society.
2. In local law, land is sacralized, and for this reason it must be viewed in relation to religion.
3. Land ownership rights do indeed exist, but they are complex and cannot be compared to the Western concept of ownership. In France and the Netherlands, for instance, ownership means that someone can dispose freely of the land they own; in principle they can sell it to whomever they wish. In most African countries, land can circulate within the same community, but sale to outsiders is basically not allowed under local norms. Land has no commercial value. This principle, however, has meanwhile lost a good deal of its force.
4. Traditional rights to land originate, generally speaking, in an act of the initial user - the so-called axe right or fire right *(droit de hache* or *droit de feu)*. By performing such an action - cutting down a tree or burning off the vegetation - the user creates an alliance between himself and the land. The entitlement thus

established is transferable to his heirs, who are expected to renew the alliance periodically.

Finally, as a case in point, I will describe some characteristics of local land tenure among the Wolofs, the principal ethnic group of Senegal (Le Roy & Niang 1976). As everywhere, a close relationship between social and political structures and land tenure exists among the Wolofs. At the centre of the Wolof system is the *lamanat*. *Lamanes* are the descendants of the first user who made the land fit for cultivation. (This can be compared to the *Tiatiu* among the Nuni in Burkina Faso, see Laurent & Mathieu 1994). As the caretaker of the land, the lamane was invested with political and social functions:

- he distributed the users' rights to the land;
- he was regularly involved in the settlement of disputes over land;
- he collected part of the yield (about one tenth).

Land tenure among the Wolofs was further based on hierarchical structures, in particular a caste system. The function of the lamanes had evolved over time. The monarchies that developed in the various Wolof kingdoms were founded on them. During the monarchical period the lamanes created more privileges, a situation which persisted in colonial times. In the nineteenth century - when Islamic influence spread over large areas of Senegal and the power of the *marabouts* (Islamic leaders) was strongly growing - many of these marabouts took over the position of lamane. As a result, many lamanes built up a strong position of power over the poor peasantry. Despite attempts by both the colonial administration and the post independence Senegalese government to curb their influence, the lamanes still play an important role in local land law today.

I want to make one final observation about other natural resources. In the view of the local population, forests were areas for hunting and gathering forest products, and they were under the charge of a game warden *(maître de la chasse)*. He arranged entry to the forests and decided who was allowed to hunt and gather in what periods. Another major function of the forest was that of expansion area for agriculture. When a village no longer had enough arable land available, a section of forest was burnt off and brought under cultivation. The rules and norms pertaining to land and trees constituted an integrated local legal system.

There was also an integrated system for the management of pasture land and watering places for livestock, which was operated by farmers and herdsmen. A well-known example is the so-called manuring arrangement *(contrat de fumure)*, under which nomadic herdsmen were permitted to graze their herds on arable fields in certain periods. In this way the fields were fertilised by natural means, the

livestock could feed on the grain stubble left by the harvest, and the farmers and herdsmen could barter their milk and farm produce.

Under the pressure of many factors, among them demographic and climatological ones but also modern legislation, this integrated management system has been subject to severe erosion over the course of time. Conflicts between farmers and herdsmen and between local people and game wardens are now commonplace.

Developments and problems

In colonial times, policy on the management of land and natural resources depended both on the ideology of the colonial power and on the system of production (whether it was geared more to export or to self-sufficiency).

The French, for example, tried in various ways and at various times either to displace the local legal systems applying to land, water and forests by French law, or to integrate them into a French system. For a number of reasons such attempts ended in failure, and the consequence was that at independence an enormous chaos of rules and regulations prevailed with respect to these natural resources.

The British, in contrast, had a rather pragmatic approach, consisting of a dualistic system under which Western colonial law was applied to white colonists, while for "indigenous people" the African land tenure systems remained in force - that is, as interpreted by colonial officials. Naturally the goal of the colonial powers was the same everywhere: economic exploitation of the colonies, which in a legal sense were regarded as a kind of tabula rasa upon which the colonisers could try out Western legal concepts to their hearts' content.

As a result, new national arrangements pertaining to land tenure and forest management had to be created in almost all African countries following independence. Most of these were based on the following premises:

- If the independent state was to attract foreign investors, then they must be given the assurance that local populations would not claim any rights to land. The state was therefore to be put in charge of land distribution.
- Local legal systems applying to land and other natural resources were unsuited to modern economic development.

The first statutory revisions in the more capitalist-oriented African nations were therefore aimed at more individualisation and private property, while the socialist-oriented countries sought to realise state ownership of land, and in many cases to develop collective farms as well (Bruce 1993: 36).

Confining myself briefly now to the Sahel countries, I must conclude that, more than 30 years after independence, national legislation with respect to land, forests

and water is either not being applied at all, or it is being poorly enforced or only partially enforced. Here are a few commonly occurring problems:

1. Language and information. Laws are formulated not only in difficult legal jargon, but also in a language (French, English or Portuguese) that the peasants do not understand. Besides that, the provision of information is, to put it bluntly, deplorable or non-existent.
2. National legislation seldom if ever takes local practices into account. A well-known example is the principle that a piece of land must be visibly in use for a peasant to officially claim rights to it. Under Senegalese law this principle, known as *mise en valeur* (exploitation), makes it possible for local rural councils, which are charged with the management of arable lands, to allocate land to people they deem capable of efficiently developing it. The prefect is then to approve the council decisions. However, the law fails to specify the criteria on which such a decision is to be based. One group of herdsmen in northern Senegal had been allocated 14,000 hectares of land by the council to use as pasture land. But the prefect then nullified this decision because in his opinion grazing was not a *mise en valeur*. Experts say, however, that setting aside land as pasture land can strongly enhance the quality of both the land and the livestock feed.
3. Generally speaking, the national legislation initially applied to agriculture, to forestry and to a lesser extent to water management. Livestock breeding was not included, although in countries like Mali livestock breeding generates a major part of the national income.
4. The official procedures for registering land rights are usually so complicated that the average illiterate peasant is unable to deal with them. One older peasant I met in Mauritania had been to the prefecture (60 km from his village) 22 different times to complete his registration dossier. In the process he had paid large sums of money to have a topographic map of his field drawn and a development plan drawn up, but his rights were yet to be registered.
5. Conflict settlement presents numerous problems in most countries, because national courts, conflict settlement by government officials, and mediation by traditional local authorities may all exist side by side (cf. Lund 1995).
6. Finally, national legislations have in no way been harmonised, leading to serious problems in border areas.

As a result of all these difficulties, appeals for new legislation have been made everywhere in recent years. At the same time there is a strong tendency to transfer natural resource management to local communities . In some Sahelian countries, land tenure and natural resource management issues have become indissociable

from the ongoing decentralisation processes (Thébaud 1995: 28). Elsewhere I have discussed the pitfalls and potentials of decentralised management structures (Hesseling 1994, 1996). Therefore, I will not elaborate them here and restrict myself to the following question : is there a real need for new national land laws or could one envisage other legal solutions for a better management of natural resources in order to give Sahelian peasants the opportunity to produce food?

Legal solutions for a better management of natural resources

Legislation can be a key instrument for developing a new policy on the management of land and natural resources. However, the prospects of changing the behaviour of the actors (peasants, but also government officials) through legislation tend to be grossly overestimated. In the sociology of law, a theory of the social working of law has been developed which is relevant to this issue. Figure 2 below, worked out by the Groningen sociology of law professor John Griffiths, shows that the behaviour of peasant men and women, government officials and foresters, and local and international development workers is governed not only by national legal rules, but also by rules generated by semi-autonomous social fields.

The concept of the semi-autonomous social field has been developed by Sally Falk Moore (1978: 57-58):

> "The semi-autonomous social field is defined and its boundaries identified not by its organisation (it may be a corporate group, it may not) but by a processual characteristic, the fact that it can generate rules and coerce or induce compliance to them. Thus an arena in which a number of corporate groups deal with each other may be a semi-autonomous field. Also the corporate groups themselves may each constitute a semi-autonomous field. Many such fields may articulate with others in such a way as to form complex chains, rather the way social networks of individuals, when attached to each other, may be considered as unending chains. The interdependent articulation of many different social fields constitutes one of the many characteristics of complex societies."

Moreover, a whole range of other factors, such as knowledge, status, organisational level and communication, can influence the decision at the shop-floor of social life to follow a particular strategy at a given moment in time. In short, the effectiveness of legislation regarding land and natural resources depends more on the motivation and situation of relevant actors than on the intentions of the legislator. The introduction of new legislation therefore requires thorough knowledge of the situation at local level.

In spite of all this, new laws are presently in the make in virtually all Sahelian countries. Let me confine myself to the example of Niger (Lund and Hesseling,

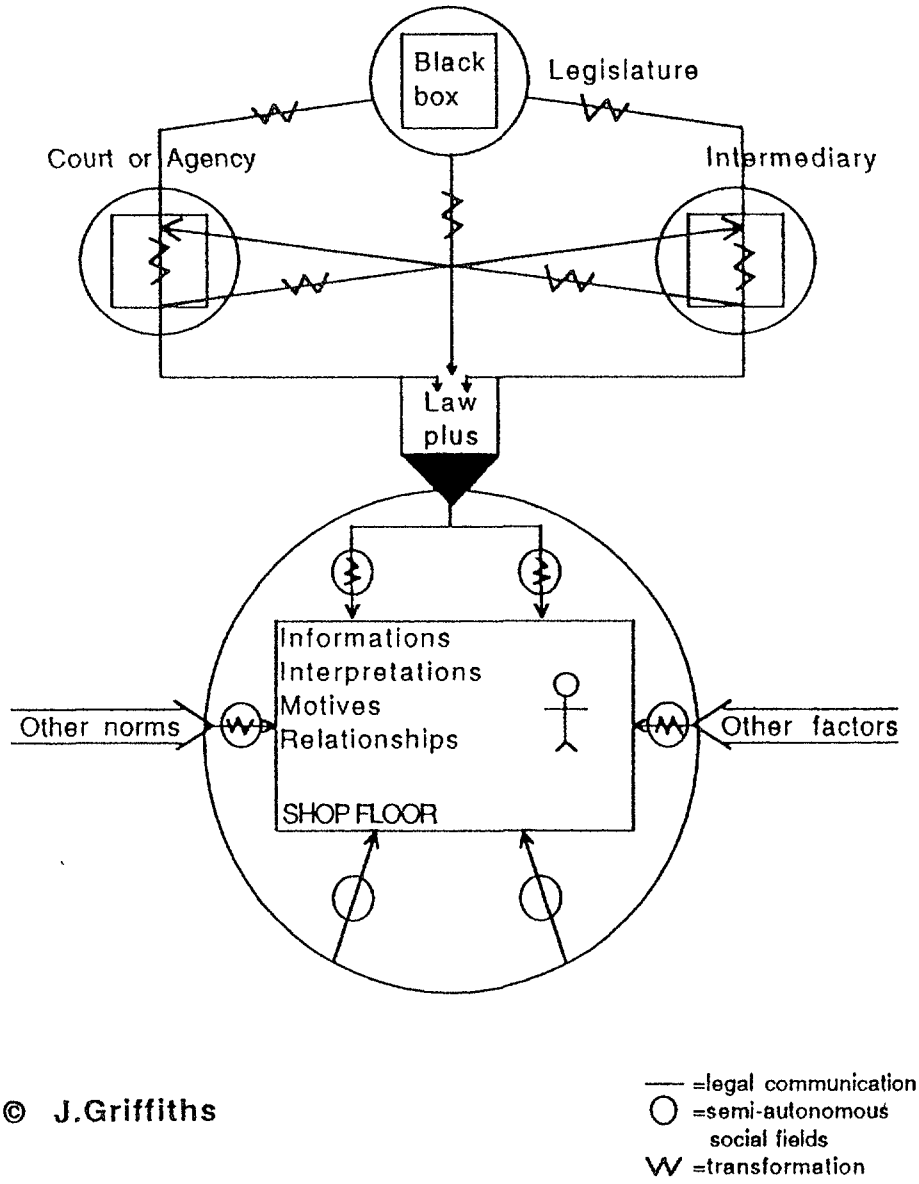

Figure 2. Analytic diagram of the social working of law
"What will the (wo)man on the shop floor actually do?"

forthcoming). New legislation known as the *code rural* has been formulated there since 1993 which is based on the following principles:

1. The basic goal is the private ownership of land.
2. Traditional claims to land are to be equated with modern private ownership (entry in the land registry).
3. Traditional rights are defined as rights which a person is supposed to have had to a plot of land since time immemorial and which are confirmed by the collective memory.
4. One purpose of this law is to enhance the legal security of all peasants.

Basing the tenure reform on local custom seems to be in accordance with the above stated prerequisite. However, it raises a series of questions and difficult dilemmas. How will the "collective memory" and "time immemorial" be produced? Whose memory epitomises the collective memory, and how far can we go back? In a society where history is almost exclusively oral, historical facts and events undergo, often unnoticeable, changes in the course of time. The purpose of the law to enhance the legal security of all peasant confronts them with a difficult dilemma in the present context of the Sahel countries. On the one hand, the peasants' survival largely demands flexibility and mobility; on the other hand a legal framework is being sought which will offer them the greatest possible security, and by definition this brings with it some measure of rigidity. Will it be possible to maintain the flexibility and dynamic character of local tenure arrangements which historically and in the present context of Niger, ensures that several groups of users simultaneously or in sequence can exercise claims on natural resources in a specific territory?

At present, the new Rural Code is still in an experimental phase and at a starting point of implementation. But bearing in mind the social working of law, it is quite predictable that the land reform will produce some unintended and negative side effects. To name but one: social relationships and thus tenure relationships at the local level will change considerably since the local chiefs have become pivotal in the definition of tenure rules. For example, recent dispute settlements by chiefs seem to point in the direction that the person granted property rights to the soil, becomes owner and controller of all natural resources attached to it without seasonal interruption. This can lead to a marginalization of the secondary use-rights which historically has characterised the production system (fruit collection, dry-season grazing, and other secondary uses of cultivated fields).

The question thus remains whether any formal centralised system of land titling could protect the rights of access to land and other natural resources in a situation where the same resource is frequently the object of multiple right holders enjoying

multiple rights. It is often stated that in the Sahelian context the critical local issue for rural people is the practical capacity to allocate, possess and use, and not the title.

One way of escaping from this dilemma in certain situations, and as a transitional measure towards private ownership, could be to encourage contracts. In an earlier article on Mali (Hesseling, 1994) I have set out the advantages of contracts. I will list them again briefly here:

- flexibility in the number of parties involved. For example a contract could make it easier to involve the appropriate groups such as cattle-herders or women groups, plus local NGO's, private producers groups, state representatives, etc.
- it is possible to protect "bundles of rights" of various user groups. While property rights (which in the long term make land registration) establish the rights of one person or one group, a contract can handle situations involving "bundles of rights" and a variety of users groups.
- flexibility of the duration of the contract. This is especially important; taking the rapid developments into account in Africa, a contract can yet guarantee users the benefits of their investments, as long as they fulfil their obligations
- it is possible tailoring contract stipulations to specific local situations; in particular a contract can contain a clause creating the possibility of, under specific conditions, breaking open the contract and reopening negotiations.
- to prevent the risk of fragmentation of policy, the agreement of local contracts with regional and national policy can be assured by standard incorporation of the obligation that these must fit within a local policy plan in accord with the framework of regional and national policy plans.

When, in October 1994, I discussed the ins and outs of management contracts with the local (male) population in a small village in Niger, the village chief sent his son to fetch a school notebook. It contained a genuine contract placed in safekeeping with the chief. In somewhat awkward French two villagers laid down that A was entitled to use the plot of B for several years on the condition to refrain from planting or felling trees, and - more important - lodging any claim for ownership of the plot. Another, more complex example is the process leading to a *convention locale* between six villages (which called themselves *Siwaa*, "bush" in the local language) in Southern Mali about the management and exploitation of a common forest. (Hilhorst & Coulibaly 1995).

The formation of such local management contracts requires, dependent on the number of the parties involved and the complexity of the situation, lengthy preparations and negotiations, whilst the outcome of the process does not always stand a chance from the very start. Local contracts are not the appropriate solution

for all times and places. Nevertheless, there is a growing awareness in the Sahel that a contractual approach may constitute a possible alternative to reaching more legal security and thus an improved management of natural resources at the local level.

People in rural Africa still largely depend on land and other natural resources for their living. Over the last few decades, they are facing not only a deteriorated environment and increasing scarcity of land, but they are also confronted with a variable, fluid and constantly evolving complex of rules and procedures pertaining to land and natural resources. Consequently, interventions in the sphere of law making at all levels will remain indispensable, but there are many other alternatives to be explored. People will have to continue their search for original solutions, based on local knowledge and local expressions. The search for a realistic legal framework concerning land and natural resources, which not only acknowledges present realities of increased insecurity but also has a capacity to adapt to future changes, is still a necessity for lots of people in the Sahel trying to survive from the products of the land.

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