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Introduction

Can land tenure legislation be modernised by integrating traditional chiefs into the legal framework and are tenure rules be clarified by referring to something as elusive as custom? Legislators and planners of rural development in Niger seem to have been thus persuaded when the new land tenure reform – the *Code rural* – was drawn up in the late 1980s and adopted in 1993 (Ordonnance no. 93-015 du 2 Mars 1993). The legislation has been considered path-breaking and innovative because it seeks to modernise tenure rules without breaking with tradition. It seeks to elevate customs to law.

When the government produces legislation that is a codification of customs, chiefs are central but their position is full of ambiguity. Chiefs are regarded at once as guardians of 'tradition' and as intermediaries between state and society; they are continually negotiating their social and politico-legal position vis-à-vis other politico-legal institutions, in particular the civil administration and the judiciary (van Rouveroy van Nieuwaal n.d.; Lund 1997). The competition over jurisdiction between chiefs and the government – generally the *sous-préfets* – is often characterised by self-contradictory efforts by both to claim legitimacy in dispute resolution, and hence in the interpretation of custom and law. On the one hand, both attempt to maintain a strict separation between their own realm and that of the other, in order to keep certain cultural entitlements to legitimacy out of the reach of other institutional actors. But at the same time each also tries to take possession of the codes, norms and procedures of the other institutions whenever that seems expedient. Chiefs refer to themselves and their jurisdictions as based on *'tradition'*. Their role as guardians of tradition is said to

qualify them to decide how tradition is to be interpreted. However, chiefs are not able to monopolise references to tradition – these are often 'borrowed' by institutional actors whose mandate is grounded elsewhere. Thus, the government often takes the Quran as a normative referent for checking the validity of statements by litigants. Another way of establishing discursive boundaries and institutional domains is to claim that *legality* is the constituent force of the legitimate authority whereby politico-legal institutions may adjudicate in disputes and interpret the law. This is a strategy used typically by the governmental authorities – most commonly in direct confrontations with other politico-legal institutions, such as village and canton chiefs, to call them to order. Chiefs, for their part, rarely employ formal administrative rhetoric in confrontations with governmental authorities, but they do invoke administrative hierarchies and procedures vis-à-vis farmers to assert their position in the hierarchy and keep from being bypassed.

The two sets of discourses are thus used for different purposes. *Reference to tradition* is used for asserting *substantive* competence or jurisdiction – knowledge about land tenure, legal processes and 'right and wrong'. Legitimation through *reference to legality* is used in asserting *formal* competencies or jurisdictions, their hierarchical order and the formal legal process of litigation. Both politico-legal institutions use rhetoric from both types of discursive domain, but they use it in different confrontational situations.

Since the 1950s, relations between the Nigerien state and chieftaincy have been characterised by a pendulous movement. In some periods, the political elite's efforts to clip the wings of chiefs and reduce them to mere auxiliary staff of the administration gave rise to great animosity between the two institutions; in other periods, chiefs have been pivotal in the political and social organisation and mobilisation of the population. More recently the role and legitimacy of chiefs is being sanctioned 'from above' by the constitution and various forms of legislation. One significant piece of legislation is the *Code rural* (Bako-Arifari 1996; Lund 1995; Ngaido 1996).

Obviously a reform process under the conditions just described is not without its contradictions. We will examine some of them here and show how they translate into legislative challenges.

The Code rural

In most countries of the Sahel during the 1980s, attention was directed towards land tenure legislation. A whole range of observations had been made by governments, aid agencies and researchers concerning the stagnating rural development, the degradation of the physical environment and the deterioration of long-term productive capacities. Land tenure insecurity was judged to be a key factor in such trends; legal reforms were considered a good way to establish tenure security, and thereby incentives for improved

natural resource management.[1] From its inception in the late 1980s, the project c establishing a tenure reform – a *Code rural* – in Niger was an ambitious one. A clarification of the modes of tenure and of transfer of natural resources – land i particular – was considered an important step towards reversing some of th unfavourable trends.[2] A special *Secrétariat permanent du Code* rural was establishe under the Ministry of Agriculture with the task of designing such a rural code. Th people behind the reform efforts were keenly aware of the importance of th workability of the reform; they recognised the risk of drawing up something ver elaborate and coherent but impossible to implement. It was therefore their ambition t avoid changes in the *actual* distribution of land while clarifying the conditions unde which that land was held. The permanent secretary of the *Code rural* in 1989, Miche Keita, put it like this:

> Rather than provoking an upheaval, this reform should bring about a improvement of the existing situation. It is not a question of giving certain forms of land tenure priority over others. This implies that the reform is limited in the following ways:
> - There will be no 'state ownership' of lands;
> - Nor will there be 'de facto expropriation' on a national scale;
> - Nor will the land be 'redistributed'.
>
> But it is, nevertheless, our ambition to propose a law that will allow the coordination of all the rights of the different right-holders (Keita 1989: 14, our translation[3])

In order to understand the different 'forms of land tenure', the authorities conducted a series of regional seminars, from which a somewhat sketchy idea of the complexity o the tenure situation emerged. One peculiar element was the overwhelming desire among the various respondents for private property.[4] It was decided that agricultural land coulc

1 For a discussion of legal and institutional incentives for natural resource management, se Hesseling 1996

2 This policy was significantly fuelled by analyses and funding from various donors, in particula France, the United States and the World Bank (Comité ad hoc chargé de l'élaboration du Cod Rural 1986; Caverivière 1989; Rochegude 1987).

3 'Plus qu'un bouleversement, ce code doit réaliser un aménagement de l'ensemble des réalité existantes. Il n'est pas question de privilégier certains modes juridiques de maîtrise du sol plutô que d'autres. Cela implique que la réforme est à la fois limitée:

- Il n'y aura pas 'd'étatisation' des terres, par exemple; – ni 'd'expropriation de fait' organisée l'échelle nationale; – ni de 'redistribution de terres' mais également ambitieuse en ce sens qu'ell vise à proposer un texte qui permette de coordonner les droits des divers utilisateurs du sol' (Keit 1989: 14).

4 Personal communication with Peter Bloch, Land Tenure Center, and Moussa Yacouba, *Sécretaria du Code Rural*. It is worth noting here that information was largely gathered from the village an canton elites (Arrondissement de Mirriah 1989:1), so it is not surprising that they should prefe private property to be the recognised principle of tenure.

become the private property of an individual, while pasturelands should be protected common property with priority access for the pastoral groups of the area.[5]

For the agricultural land, private property was to be the culmination of a series of steps towards official initial recognition. If customary rights could be asserted, a written *dossier rural* was to be created, and the rights would be transformed into private ownership after an unspecified lapse of time. The political ambitions were therefore to achieve a merger between tradition and modernity, rationalising the tenure system without breaking with tradition. Thus, the state would not *grant* modern property rights to customary land owners, it would simply *recognise* them. The ways in which customary rights were to be recognised were specified in Article 9 of the *Principes d'Orientation du Code Rural.*[6]

Driven by the desire to provoke as little disruption of social relations as possible and to base any change on local knowledge, rather loose and flexible concepts like 'time immemorial', 'collective memory' and 'customs of the area' were accorded decisive importance. The *autorité coutumière compétente* – i.e. the canton chief – was recognised as the institution through which people must pass to get private property rights formally established. Another decree from 1993 confirmed the central role of this authority in the event of disagreement about the 'collective memory' or about what is customary:

> Decree no. 93-28 of 30 March 1993 concerning traditional chieftaincy in Niger reaffirms that the traditional authorities decide on the use by families or individuals of cultivated land and other areas to which the communities under their authority have recognised customary rights (*Secrétariat permanent du Code rural* 1994: 4-3, our translation[7]).

5 This last element creates problems of definition related especially to *'terroir d'attache'*, or 'land where specific pastoral groups have access priority', in the nomadic/pastoral zone.

6 'Customary property is the result of 1) acquisition of land through succession, confirmed since time immemorial by the collective memory; 2) permanent allocation of land by a competent customary authority; 3) any means of acquisition recognised by local customs. Customary property confers full and effective ownership on the proprietor.' ('La propriété coutumière résulte de: 1) l'acquisition de la propriété foncière rurale par succession depuis des temps immémoriaux et confirmée par la mémoire collective; 2) l'attribution à titre définitif de la terre à une personne par l'autorité coutumière compétente; 3) tout autre mode d'acquisition prévu par les coutumes des terroirs. La propriété coutumière confère à son titulaire la propriété pleine et effective de la terre.') (our translation)

7 'Le décret no. 93-28 du 30 mars 1993 portant de la chefferie traditionnelle du Niger réaffirme que les autorités coutumières réglent selon la coutume, l'utilisation par les familles ou les individus, des terres de culture et espaces ruraux sur lesquels la communauté coutumière dont elles ont la charge, possède des droits coutumières reconnus' (*Secrétariat Permanent du Code Rural* 1994: 4-3).

Canton chiefs – the link between custom and state law

The pivotal elements in the reform are customary rights and chiefs who are authorise to interpret them. While chieftaincy was established and developed well befor colonisation, it was transformed by the French administration. The latter altered th territorial jurisdictions of chiefs, modified their numbers, changed their prerogative and integrated them into the state as administrative auxiliaries. In contrast to man former French colonies, this organisation was maintained in Niger after independenc (Guillemin 1983; Le Roy 1979:114; Raynal 1993; Robinson 1975; 1983; 1992).

A system of cantons and *groupements* was created by the French colonia administration between 1904 and 1924. Basic traditional entities were split up an reorganised, and persons who had proved their loyalty to or compliance with the Frenc were appointed traditional leaders – canton chiefs.[8] Generally, the Frenc administration was careful to seek out candidates who had some claim to bein noblemen (Olivier de Sardan 1984: 221). However, candidates also included people lik interpreters, domestic servants of the French, or African soldiers retired from the Frenc army[9] (Gamory-Dubourdeau 1924; Abba 1990: 51; Salifou 1981; Fuglestad 1983: 84 89; Suret-Canale 1970: 64). Some chiefly claims to an ancient royal pedigree are henc somewhat of a fabrication, as illustrated by the anecdote about the chief's access to th throne in the Canton Gao.

> *Sometime in the 1950s, a French film crew had visited Niger to document traditional festivals, rites and ceremonies. The film crew's schedule did not coincide with the death of any canton chief and the subsequent crowning of his successor, so it was decided to stage one. The 'cinéastres' asked the canton chief of Gao if he would allow his son, Issaka Yahaya, to act out his future crowning in the documentary. The chief was dismayed, and refused to allow it. Finally, he did accept to let his Galadima [a Hausa term for a kind of minister of home affairs, Nicolas 1975] wear the crowning outfit and*

8 The qualities the French desired of a chief were aptly illustrated in a letter from one Capitai Brounin to his superiors in 1937: 'On a fait au chef de canton une bien triste réputation, la vér m'oblige à dire qu'il présente à côté de défauts incontestables de sérieuses qualités qui so l'endurance, la volonté, la perspicacité et l'autorité, il suffit de le secouer un peu et de le surveill il a montré en plusieurs occasions qu'il était capable de décision; il se décharge aujourd'hui de presque totalité de son travail sur son fils Yérima: personnage énergique, autoritaire, ambitieux violent, son activité doit être contrôlée, peu aimé de tous il est craint et redouté; il possède demeurant de réelles qualités de chef. Je pense pour l'avoir mainte fois constaté ailleurs que meilleurs à nos yeux ne sont pas très bien vus de la population.' Zinder, 5 avril 1937. (Fr Archives Nationales de la République du Niger, Niamey. Rapport de tourné dans le canton Dogo, Zinder, 3-27 mars, 1937. Filed under: Zinder, 1937)

9 One of the best researched examples is the story of Aouta from Dosso. From being a deprav princeling with no authority or economic wealth struggling through as a rural merchant-cu highwayman, he was enrolled as an *'agent politique auxilliaire'* and subsequently appoint Zarmakoye (leader of all canton chiefs) of Dosso by the French (Rothiot 1988).

promenade on a horse before the camera. The scenes were shot and the film crew left.

The chief had previously had some controversy with the Sultan of Zinder – the latter considered that the canton chief owed him 900 measures of millet. The chief did not accept this. It was by no means an unusual occurrence, but it was successfully exploited by the ambitious Galadima when the real death of the canton chief occurred. While Issaka Yahaya campaigned among the village chiefs in the Canton to become his father's successor, the Galadima went to the Sultan. There he struck a bargain: he would pledge loyalty with the Sultan and deliver the 900 measures of millet if the Sultan would support his candidature. While the Galadima was not of the noblest blood, the earlier documentary proved to the government authorities that he was indeed the dauphin and rightful heir to the title. Subsequently, he was inscribed in the register as the state-recognised traditional chief with corresponding prerogatives, notably to collect taxes, supervise land transactions and resolve local disputes.

The followers of the previous chief soon found their pastures and fallowed fields under the control of this new and energetic chief who was eager to make money by granting-cum-selling access to alleged unoccupied land. Thenceforth, spite and vendetta characterised relations between Issaka Yahaya and the new canton chief. (Lund 1995: 91)

Canton chiefs became the link between the emerging modern state and the population. The colonial administrator depended on the canton chiefs for maintaining law and order and for tax collection, and this social position gave the chiefs several advantages. The French colonial officer was supposed to dispense justice according to legal decisions and local customs. For this, he depended entirely upon the partly-invented chiefs, and this left considerable scope for the imaginative and opportunistic invention of customs.[10] This legal set-up not only had consequences for the primary rules about who is entitled to what. It also put the power of secondary rule-making – the power to make rules about *how to decide* who is entitled to what – in the hands of chiefs.

How did this affect the development of various customs relating to land tenure? Customary land rights have always been somewhat ambiguous. If we take the customs prevailing in South Central and Southeastern Niger, where the Hausa culture is dominant,

10 Arbitrary advice was frequent, and this encouraged the colonial administration to record local customs 'once and for all' in order to establish an unambiguous base for the rule of law. The Nigerien Rural Code is therefore by no means the first attempt in Francophone West Africa to merge tradition with modern law (Blanc-Jouvan 1971). According to Le Roy (1991b) this type of recording has been undertaken since 1905. Evidently, none of these efforts has solved the problems 'once and for all'

the ambiguity between the rights of the descendants of the first occupant and the actual tiller of the soil allows for various interpretations.

Tenure systems are closely connected with production. When land was in abundance, shifting cultivation on the communal fields of the extended household was the most common mode of production, and fallow of long duration followed some years of cultivation. In practice, if an individual brought uncultivated land in the bush under cultivation, he would do this as a member of a lineage, performing its particular cults; the land would thereby enter the patrimony of his clan and lineage. The person (and household) cultivating the land retained the right to do so until they ceased cultivation and no trace of cultivation remained. Their rights entitled them to use it, but not to sell it, and their rights were extinctive, i.e. if they ceased to cultivate it they would eventually lose their rights to the land (Raulin 1965: 134; Latour-Dejean 1973: 6). This interpretation of tenurial rights accords primacy to *work* as the feature that defines rights. The one who tills the soil has an inalienable right to continue doing so, and to enjoy the fruits of that labour. The right to control the land was thus limited to the time the farmers themselves farmed it, and it did not include control of it after transfer to another.

Competing notions of property rights also prevailed, however. Migration, settlement and the increased commercialisation in the zone seem to have favoured notions of non-extinctive rights. The evolution of certain rights of inheritance, combined with the growth of a more hierarchical social structure, influenced the concept of land tenure and undermined the older principles.

Thus, even if land was abandoned, the person who first cleared the land (and his descendants) retained a preeminent right to it. This hereditary right of the first occupant was not affected by the actual land use. The land could be cultivated or could lie fallow for many years, but the first occupant and his descendants still retained a preeminent right to it (Latour-Dejean 1973: 6). The right to control thus seemed inalienable. The transfer of land to households outside the first occupant's lineage established a sort of landlord-tenant relationship, so that the founding lineage of a village constituted a class of landowners. Important members of this group became the nobles. In this line of reasoning, the notion of extinctive rights pertained to the actual household and its access and cultivation of the land. So, contrary to the norms in the previously described system, the *access right,* rather than the right of control, was extinctive.

On top of this ambiguous normative repertoire came state regulation and a recognition of the tenure system through the tax system. The colonial administration institutionalised the payment of taxes to both the state and chiefs. As tax collectors, chiefs were given a percentage of state taxes, and this incentive to zealous collection has been maintained to this day. At the same time, however, a new fiscal tradition was also invented. While gifts had, of course, been offered to chiefs before, it was during

the period of colonisation that *tithes* to chiefs were sanctioned as an obligation. However, as Olivier de Sardan has observed, 'The tithe is neither a traditional concept, nor a legal one; nor is it a religious obligation, a political institution or a land tax; it is a bone of contention' (1989: 224, our translation[11]). Thus, the tithe has no clear normative reference but is an ambiguous and negotiable sociopolitical transaction. Nonetheless, tithe payments were also linked to the tenurial status and rights of the chieftaincy.

The position of the colonial administration was also ambiguous. In the first place, it asserted the state's ultimate right to land, and any specific land rights were granted in principle by the state. The administration recognised farmers' use-rights and local tenure customs only as long as these were considered use-rights only.

The colonial criterion for retaining the use-right was that the land was being 'put to use' (*mise en valeur*). On the one hand, this concept favoured some of the local interpretations of custom, whereby those who work on the land hold the use-right for as long as they continue to work. On the other hand, the state depended heavily on chieftaincy for the administration of the colony and did not seriously challenge the authority of the chiefs vis-à-vis the farmers. It therefore also supported the notion of an inalienable right *vested in the chiefs* to control land allocation, and it regarded the tithe as the commoner's payment to the chief for being allowed to cultivate the land. The tenancy relationship that existed before colonisation between the first occupant and the person cultivating the land, thereby had a generalised version of a tenancy contract superimposed upon it in many cases. Vast tracts of land were declared *terres de chefferie,* or 'chiefs' land', during the creation of the chieftaincy by the colonial rulers.

This ambiguity persisted after independence. The successive governments needed popular legitimacy, and it was especially important for the government and the central administration – composed of the educated, political, urban elite with ambitions of modernisation – to limit the political, social and economic power of chiefs.

Both the Diori government (1960-74) and the Kountché government (1974-1987) took steps to curtail the powers of the chieftaincy and landowners vis-à-vis the use-right holders (Ngaido 1993: 3; Charlick 1991). The payment of tithes was therefore prohibited in 1960, and a series of other laws were enacted during the 1960s.[12]

11 'La dîme n'est d'abord ni un concept traditionnel, ni une notion juridique, ni une obligation religieuse, ni une institution politique, ni une redevance foncière: c'est un enjeu' (Olivier de Sardan 1989: 224).

12 The most significant of these laws were 1) the Act of 25 May 1960 (Loi no. 60-28), which set the conditions for developing and managing state-funded irrigation projects; 2) the Act of 25 May 1960 (Loi no. 60-29), which prohibited the payment of tithes; 3) the Acts of 26 and 27 May 1961 (Loi nos. 61-5 and 61-6), which fixed the northern limit for crop cultivation and declared the land north of that line to be reserved for pastoralism. This limit was meant to separate the different regions of Niger by vocation; 4) the Act of 19 July 1961 (Loi no. 61-30), which laid down the procedures for confirming or expropriating customary tenure rights; 5) the Act of 12 March 1962

Generally, the formal abolition of the tithe provoked a large number of conflic between use-right holders and owners of the land, with the latter defying the ban an insisting that tithes be paid or some other symbolic payment be made in recognition their continued ownership. Basically, the acts and decrees had little fundamental impa on the powers of chiefs; the laws were simply not obeyed. Nor did people claim form title to their land, even though that was the intention of the 1961 law (Loi 61-30). Th non-enforcement of all these laws and decrees can be seen as a consequence of th state's, and in particular the local administration's, dependence on the chiefs and th authority they wielded over the general population. In spite of rhetoric and ambitio intentions to clip the chiefs' wings, little was effectively done to weaken their positio Rather, a profusion of ambiguous enactments, decrees and other authorised interpr tations in the form of political speeches were propagated (see Ngaido 1996 for details)

Like his predecessor, President Kountché sought popular legitimacy for his regin partly by attempting to limit chiefly powers and gain the support of the farmers. Rig after his 1974 takeover, Kountché declared on national radio that all land, no matt how it had been acquired and no matter what tenure rules it was held under, shou henceforth be the private property of the person cultivating it (Rochegude 1987).

The fundamental ambiguity of tenure matters was compounded once again, however, another decision to give local governmental and traditional institutions the mandate mediate and resolve tenure conflicts. In a 1975 ordinance (Ordonnance no. 75-7), t *préfet,* the *sous-préfet,* the canton chief and the village chief were endowed with t power to conciliate in tenure conflicts (Ngaido 1993a: 9). This opportunity to reass their privileges and prerogatives was not neglected by the chiefs. This again led conflicts between use-right holders and the nobility and landowners, and the gover ment resorted to issuing decrees and circulars which again aimed at curtailing chie power.[13] The most significant of these first limited, and then in 1977 forbade, t participation of local government and the chiefs in land conflict resolution. Despite th new decree, neither the conflicts nor their sources disappeared. Consequently,

chiefs; and 6) the Decree of 29 May 1962 (Décret no. 62-128/PRN/SEP), which determined composition and operation of the committees charged with assessing the number of plots contro by traditional chiefs and the farmers cultivating those plots. These committees were composed government officials, deputies and chiefs.

13 The most important measures to be introduced were: 1) The 16 December 1977 Circular 8/MI/SG) formally prohibited local authorities, administrative as well as customary, fi participating in any procedure for resolving litigations over plots. 2) The 24 April 1980 Circ (no. 12/MI/SG/CIRC) quoted the president's speech to the nation which had stipulated that local administrative and traditional authorities should not be involved in any cases of con resolution. 3) The annual circular (no. 004/MJ/GS) forbade any resolution of land litigation fro April to 31 October each year In addition, in the event of litigation, a plot was to remain under control of the farmer who had cultivated it the previous year 4) A 1983 act required that every be registered in their village of residence This meant that the farmers were registered in villages where they had their lands. In cases where the village they lived in and the village wh they had their land were different, many problems arose, such as conflicts between cantons between villages.

institution had legal jurisdiction in land tenure questions; no conflict had a predictable course; and none of the institutions operating in the rural areas had formal powers to give a final, let alone written, decision in land conflicts. The result was an absolute intransparency of rules and jurisprudence. Everything was in limbo.

With the *Code rural,* the pendulum has now swung back once more, and chiefs have now again become pivotal in the defining of tenure rules meant to embody the customs the new law is based on.

Contradictions and legislative challenges

Basing the tenure reform on local custom is appealing because of its seeming simplicity. However, it does raise a series of questions: How will chiefs determine local customary law? Will it be possible to maintain the flexible, dynamic character of local tenure arrangements in Niger, which, both historically and in the present-day, ensure that several groups of users can exercise claims on natural resources in a given territory, either simultaneously or in sequence. Will the reforms alter the social structures of society? While full implementation of the rural code is still a long way off, the history and the recent development of Niger enable us to discuss some of these points.

Customary legal procedure and the new rural code

The *Code rural* operates on the concepts of 'time immemorial' and 'collective memory'. Property rights are thereby recognised if the land has been in the claimant's possession since 'time immemorial'. How will the 'collective memory' and 'time immemorial' be established; whose memory epitomises the collective memory and how far back can we go? In a society where history is almost exclusively oral, historical facts and events undergo often unnoticeable changes over time. Like any other country in West Africa, Niger has a long history of migration and settlement, and there have probably been several 'first occupants' of many places. Hence, a situation often prevails where several 'truths' are possible, and this makes legal procedure a crucial moment.

Whenever a chief is approached to settle a conflict over land, unsettled debts, divorces or whatever, gifts change hands. Not only do plaintiffs and their adversaries present gifts at their audiences and convocations; after closure of the case the 'winners' offer gifts to display their gratitude, while the 'losers' give them as a token of appreciation that the judgment was moderate.

In practical terms, plaintiffs and defendants are summoned by the canton chief to take an oath on the Quran in support of their claims. Religion is an important normative referent, and swearing on the Quran is almost universally accepted to be a gesture of

truth. The use of the Quran to check the veracity of statements in legal procedures very common. Lying while under oath subjects the perjurer to unpleasant supernatu sanctions such as leprosy and impoverishment. This doctrine, warning of the gr consequences of violating what has been made sacred by using the Quran, is wid believed to be true in Niger. As a result of the doctrine's pervasive power, the Quran widely invoked in disputes, by chiefs and administrative authorities alike, especially *sous-préfets.* To decline to subject oneself to 'Quranic trial' is effectively admitting is in the wrong. It has a further effect as well. Tactics of manipulation are recounted anecdotes and stories, such as 'Some people have their old folks swear since they going to die soon anyway' or 'The Quran was not hand-written, but from a print house, so it had no power.' Hence, the result of employing the Quran is ambiguous: individual fears it, but suspects that others fear it less. Since an oath on the Quran has be ordered by the canton chief, he is in a position to control the situation to a la extent.

Furthermore, hearings are often riddled with 'traps'. For example, if a chief a someone to state who first authorised their (or their ancestors') settlement, this perso trapped. If they answer 'the chief', then they recognise that the chief has the autho over the land and that they themselves do not own and control it. If they answer one, we were the first', then they find themselves in deeper trouble, since they there admit having defied the politico-legal authority of the chiefs by just squatting on land. The recall of 'collective memory' and the time period 'since time immemorial' thus highly manipulable concepts, and the chiefs benefit greatly from the bribes that forthcoming.

Rural property and the customary notion of 'time'

In both the French and the Anglo-Saxon legal traditions, proprietors must make th ownership known if another person is found to be using (cultivating) their prope Failure to do so generally leads to the loss of the property after a certain period, 20, or perhaps 50 years. The person using the property in ignorance of another 'owne existence will thenceforth be considered the owner (Ouedraogo et al. 1996: annexe 6; Rose 1994: 11 ff.). Since the *Code rural* contains no time limit to render cla outdated, the door is opened to indefinite claims, which will be dealt with in the hig manipulable procedure of providing proof.

As we have noted above, two different and often conflicting customs bear upon question of which right will be transformed into the right of private property: Is it inalienable right of the first occupant – interpreted in many cases as the chief – control the distribution of the land, or is it the inexpropriable use-right of the pre tenants? Since the reform holds out a future recognition of 'owners', those who bolster their claims with references to 'traditional ownership' seem to be ahead of th

who must count on 'traditional use-rights'. This seems even more likely if we consider the influence chiefs have on the interpretation of customs. This results in two very different outcomes for farmlands and pasturelands.

In cases of conflict between farmers over the ownership of a field, the 'inexpropriable, time-honoured' right of the actual user gives way to the 'inalienable' right of the first occupant, no matter how much time has passed. Good political connections and sound finances enabling bribery may then still make it possible to successfully take up the case again with the canton chief.

The importance of custom in the reforms gives chiefs a particularly favourable position when it comes to uncultivated lands. Such areas may be considered to be for pastoral use, but since no resource user is exploiting them in the conventional way (that is, cultivating them), they may also be considered chiefs' lands, even though that concept has been officially abolished.

Thus, in contrast with disputes between farmers over a cultivated field, the time elapsed need not always be so long to establish ownership in disputes over pastures. Whilst claims to a pastoral area for cultivation are generally backed by precedents, often the precedent only dates back to the previous year. It is therefore very rare for farmers to be evicted from what has been a pasture since 'time immemorial'. If cultivation has already taken place, the farmer can usually stay on. Many pastures are under pressure. The extension of cultivated fields into the pastoral areas is the predominant trend, even to the point that it is seen as a minor victory for pastoralists if they manage to maintain the status quo. Although some degree of interest in protecting the pastures can be detected among canton chiefs and civil servants, it seems to give way as soon as the confrontation becomes intense. Numbers may also be important in some ways: the farmers constitute a larger tax base for the canton chief, but a large group may also appear threatening. We illustrate how some of the ambiguities of the status of these lands has been exploited by chiefs:

Assistant sous-préfet confronts canton chief – but a compromise is reached

When Manzo's father settled in the village of Dinney in the 1960s he got some plots of land with the help of the village chief. With the division of property upon the death of Manzo's father, the plots had become too small to satisfy Manzo's needs. In 1994 Manzo and his cousin and neighbour, Ajagoula, asked the canton chief of Gao for land. The chief made sure that the requested land was not in the vicinity of a well or a cattle corridor, and he assigned some additional land in the pastures to Manzo and his cousin for money, but we do not know how much. The field was demarcated by one of the chief's courtiers.

A group of cattle owners who used the area for pasture went to see Salissou,

since he was considered a man of wit and courage and was suspected of harbouring a grudge against Manzo, whose origins were lost in the past but a genuine grudge nonetheless. At first, Salissou went to the canton chief to ask him to withdraw Manzo's licence to cultivate in the pasture. The chief refused, claiming a right to sell his canton if it pleased him. Expecting this type of answer, Salissou, unabashed, went to the sous-préfet in Mirriah town and obtained a summons for Manzo, Ajagoula and the canton chief on the disputed land, and a new round of negotiation ensued.

On the day of the settlement, the assistant sous-préfet argued that the chef de canton was in no position to sell land in the common pastures and that Manzo would have to abandon his new field. The chief, on the other hand, maintained that he was entitled to do so, and that it was unacceptable if the assistant sous-préfet insisted, since his credibility as a chief was at stake. The assistant sous-préfet did, nevertheless, insist and asked the neighbours of Manzo and Ajagoula to show the boundary between the pasture and the fields. This was done, and from here the sources differ somewhat: Salissou claimed that the assistant sous-préfet asked both Manzo and Ajagoula to vacate their new fields, while Manzo claimed that only Ajagoula was asked to do so. However, regarding the result their stories concurred: Ajagoula abandoned his field first, but when he saw that Manzo did not, he also recommenced cultivation, and both continued to cultivate their fields when the assistant sous-préfet went back to his office in town.

The result of the confrontation between Manzo and the pastoralists thus turned into a dispute over authority between the assistant sous-préfet and the canton chief. The dispute seemed to be impossible to settle without one of them going back on their word, but a subtle kind of compromise was actually reached. The assistant sous-préfet managed to retain his formal authority by demonstrating that he could overrule the canton chief and decide on the protection of the pastures (which was the objective of his mission). The canton chief succeeded in retaining effective authority, however, since his decision to grant Manzo and Ajagoula land also carried. The decision was formally reversed, but it was effectively maintained – though not as status quo. The fact that Manzo and Ajagoula got away with it, so to speak, was a message to their farming neighbours and the real root of anxiety among the pastoralists. The confrontation would buttress the image of the canton chief among his subjects as someone who stands up for them and was not shoved around by the administration. (Lund 1995: 141).

This case may give the impression that the canton chief is generally amenable to cultivation of pastureland. Indeed he is, unless the pastoral interests are important – that is, if he would benefit financially from defending them. This does not mean that

pastureland in the agricultural zone is doomed, but that enterprising, experienced and committed political protection and leadership on behalf of pastoral interests are probably necessary prerequisites. And such is generally in short supply.

When the notion of pastoral lands and the rights of specific groups to these lands need to be established in practice, a number of unresolved questions are set to pose challenges to the legal system: How will these groups be defined? Can pastoral producers cultivate fields in pastures and, if so, how can cultivation by others be prevented (morally and practically)? How will priority access be understood; does it imply the right to exclude others (and if so whom)? etc. If these questions are left for the canton chiefs to decide, traditional pastoral groups are bound to lose out.

The problem of codification

A fundamental contradiction in the *Code rural* endeavour is the ambition to codify tenure rules while not disturbing the prevailing situation. The planners assumed that if they just codified the situation as it was, nothing would change dramatically. However, it is the codification itself which constitutes the greatest change. And this is so at several levels simultaneously.

The announcement of the tenure reform amounted to an invitation to have customary rights in land recognised now in order to secure irrevocable private property rights later. 'Get your customary rights to your land recognised before your neighbour does' seems to be the maxim distilled from the *Code rural* by the general population. Thus, while several different customary norms prevail and could potentially be invoked in support of property claims, the *Code rural* has now injected an idea of deadline into society.

Studies by Ngaido (1996) and Lund (1993; 1995) show that as a consequence of the announcement of the reform, the number of disputes brought before the canton chiefs and the administrative and judicial authorities has increased substantially. The *Code rural* did not *cause* such disputes, but it has unleashed them. In addition, political conditions in the late 1980s and early 1990s, with the downfall of the military regime and emerging political democracy, gave rise to a general contestation of the authority of politico-legal institutions, including that of chieftaincy. People have more readily rejected legal settlements and appealed. Thus, while the *Code rural* has triggered a large number of disputes, the nature of dispute settlement also seems to have undergone some transformation.

Codification also means change at a different level. Recent dispute settlements by chiefs seem to point in a certain direction: that the person granted property rights to the soil becomes owner and controller of all the natural resources attached to it, without seasonal interruption. This can result in a marginalisation of the secondary use-rights

that historically have characterised the production system – fruit collection, dry-seas grazing and other such uses of cultivated fields. Codification thus also tends to imp simplification. While the cohabitation of different user groups has historically been source of both conflict and cooperation, codification will mean a once-and-for- recognition of one group's rights at the expense of the others, with the permane eviction of the latter as a consequence. This is likely to usher in bitter conflicts alo ethnic lines on a massive scale.

At yet a different level, the reform has boosted the social position of chiefs. Settling t increasing numbers of disputes has yielded many chiefs a windfall income, and the ru on the pastures seems to be a virtual 'money-machine' in some parts. Conversel tenure security seems to have declined markedly for those who have neither capital n sociopolitical connections to protect them from others' claims to their land.

Finally, at a more general level, the reform – the codification – signifies a change in th relations between society and the state, in the form of both government authorities an the chieftaincy. Transactions that previously took place under informal, privat conditions, with the threat of intervention from the chief as a potential disciplinar sanction, now appear to provoke direct formal intervention from a politico-leg institution, namely the chiefs. Historically, unequivocal exactitude was neither require nor desired, since land resources were more plentiful and transactions could hol multiple meanings. When land was transferred from A to B, it could be a loan, a gift o merely A showing B a good spot. Such transactions, which historically required les formal intervention from the authorities, are now frequently the object of lega proceedings by canton chiefs, *sous-préfets* and magistrates, and the present need fo exactitude is projected into past transactions that were by nature opaque.

State regulation of tenure disputes has not only been accompanied by extension of th activities of legal or administrative authorities, but also by increased competitio between the different politico-legal institutions. This has developed into quite paradox. Because settlements are more readily rejected, the litigants take their case from one institution to the other, exploiting this institutional competition. On the othe hand, it would appear that some kind of socio-legal umpire is desired (otherwise people could have just ignored the settlements), and that rather than rejecting the state, rural citizens invoke state power in existing institutions. Thus, state control or arbitration is asked for by the citizens, not merely inflicted upon them. Consequently, the reform has thus far produced more regulation of society by politico-legal institutions, at a time when the legitimacy of these institutions is declining.

Legislators face a continual dilemma: To what extent should laws reflect reality, and to what extent should they change it? The Nigerien experience shows that even if you only want to reflect reality, the reflection itself changes it.

Conclusion

Many efforts at institutional reform in Africa have been hampered by the neglect of the existing politico-legal infrastructure. The Nigerien *Code rural* process stands out as an ambitious attempt to put that infrastructure to constructive use. There are a number of weaknesses in the reform, however.

The overall aim of enhancing tenure security has been turned into a transformation of certain customary rights to private property. This reflects a simplistic notion of customary tenure, and it proposes a linear transformation of tenure regimes which is patently inadequate. Secondary right-holders such as pastoralists and women also merit a degree of security of access and exploitation of specific resources. Therefore much more creativity is required to accommodate the nuances and the flexibility of local land, use practices into a codified form of customs. Different degrees of restrictions on the rights of primary right-holders to exclude others should be conceptualised. That would facilitate local negotiations that could do justice to the specificity of the varied localities in Nigerien society.

The idea of modernising rules on the basis of what is known to the population, thereby relying on institutions more decentralised than any purely civil servant-based administration could ever be, is certainly worth pursuing. Nevertheless, the developments in Niger also show it is naïve to trust in the ability of custom and chiefs to steer by themselves towards good governance, rule of law and social justice. A major challenge is therefore how to subject the chiefs and customs to public or democratic control without undercutting their authority. The chiefs have been regarded as instruments for implementing the *Code rural,* and their role and capacities as quite static. However, experience shows that chiefs readily project their authority into the rather different roles of 'administrators' of land rights and 'judges' in disputes. Chiefs are not mere receptacles of authority which can be opened and shut according to the needs of the legislators. Quite the contrary, chiefs are capable political actors in pursuit of interests. This may or may not favour the implementation of the *Code rural.* Consequently, if the chiefs are to have a central role in the reform, a serious effort to secure their commitment to the policy objectives seems absolutely essential. This, in turn, implies political negotiations to establish their role and to train them to perform it well. One key aspect of their role that needs clarification is to what extent the chiefs should be mere mediators (as the text of the law prescribes) or should have the authority to decide on disputes (as is often the practice). A pragmatic first step would be to modernise recording procedures. If the outcome of the litigation process at the level of the chiefs were to be put in writing, it would matter less whether it was a 'settled' or 'mediated' outcome that is being pursued further in the legal system, and in theory it could increase transparency and facilitate the chiefs' accountability.

The odds are, however, that written records would still have a limited effect as long as the average rural Nigerien is illiterate and ill-organised in unions or interest groups, thus remaining unequipped to confront and control authority.

The implementation of a legal reform, and especially a land tenure reform, in a society so immediately dependent on its natural resources is bound to have repercussions on social and political institutions. Even when labelled traditional, these are contemporary and modern, and they are constantly being renegotiated through the political process. If reformers disregard this, they run the risk of becoming policymakers in the virtual reality of their imaginations, thereby missing the point entirely.

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