1 Land Tenure Certainty and Public Authority

The land tenure situation in rural Africa is often described as uncertain and insecure, and recent reforms have addressed this issue. Consequently, it is paradoxical that measures taken to reduce the insecurity that rural people face daily in fact often increase uncertainty, or at least reconfigure it. Responses to this by local people and local political entrepreneurs vary and raise fundamental questions about public authority and institutional competition.

One of the most persistent themes in the writings on land tenure in Africa is tenure security. Assessments of policies pertaining to land are often assessments of whether a particular policy leads to greater or lesser land tenure security. Generally, land tenure security is seen as benign, either because it supposedly enhances investment and productivity, or because it supposedly reflects some form of social justice; or both. However, reviewing even parts of the literature, one finds first of all that tenure security is less than clearly defined and often confused with certainty. Second, in so far as tenure security is synonymous with private property, it cannot be said always to be necessary in order to enhance productivity, let alone sufficient to engender it.

Land reforms and land tenure reforms continue to be on the political agenda in Africa. Most countries in sub-Saharan Africa are engaged in some sort of reform efforts. The reforms vary in their elements and objectives, as do the implementation processes. Despite the variation, however, reforms of the 1990s seem to share one common feature. Whereas land tenure reforms in Africa historically have attempted to replace existing structures, a more pragmatic adaptive strategy of reconfiguring customary and statutory law is now emerging (Bruce et al. 1994). Rather than a romanticisation of customary land tenure, this tendency reflects a recognition of the robustness of social and tenure systems and their capacity to evolve relatively autonomously from the state. It suggests that state policies should take their point of departure from what is, rather than from idealised end-situations. As a result of this, emphasis in recent literature on African land rights and land policy is increasingly on the consequences of recognising customary...
forms of land tenure, stressing that land tenure changes have comprehensive implications for many other policy arenas, for administration and governance (Lavigne Delville and Mathieu 1998; Toulmin and Quan 2000).

However, rights are not merely granted to people through political reform by a benevolent state as a result of reasoned deliberation. People also acquire, entrench and conquer rights in practice through confrontations and alliances with other people, institutions and the state. One of the intriguing things about securing claims to land and other resources is that it seems to be a universal preoccupation. Notwithstanding the various policies and reform efforts, people put tremendous efforts into vindicating, asserting and securing claims to land in Africa. This article deals with one way in which people try to get there.

The informal recording of property transactions on paper seems to develop proportionally to the states' generally less-than-successful efforts to record formally the land tenure situation. In many African societies it is either illegal or practically impossible to acquire a formal deed to one's land, either because the state considers itself to be the sole proprietor or because overly formalistic and cumbersome procedures prevent ordinary people from acquiring such documents (Atwood 1990; Shipton 1988). Nonetheless, a wide variety of written documents recording property transactions exist in rural Africa. While these are not deeds or contracts in the formal sense, informal practices of public validation by a variety of politico-legal institutions have developed (Lavigne-Delville and Mathieu 1999). In addition to the acts of possession, i.e. the physical demarcation in the landscape and the presence in the field when cultivating and harvesting, new symbols of property, written testimony, emerge to compound peoples' claims (Rose 1994).

As land tenure and property are integral to larger social, political and economic processes, the key question becomes "who has the authority to sanction property?" It is my contention that the process of recognition of property rights by a politico-legal institution simultaneously constitutes a process of recognition of the legitimacy of this institution. These processes work in tandem: they fail and succeed together. In this perspective property and politico-legal institutions, or social norms and the state, are essentially precarious. Property is only property if socially legitimate institutions sanction it, and politico-legal institutions are only effectively legitimate if their interpretation of social norms (in this case property rights) is heeded. Hence, public authority is being constructed in the imagination, expectation and everyday practices of ordinary people. Conversely, if hitherto hegemonic institutions that have guaranteed property rights cease to be sufficiently powerful, the property they guaranteed becomes more uncertain. Seemingly trivial actions by individuals can undermine state policy and the legitimacy of state institutions by simply not respecting the policy and taking their justice-business elsewhere. Property and authority are constantly at stake. There is a certain circularity in this kind of argument, however; a social norm and a socially accepted institution dispensing sanctions are not suspended in timeless isolation. It is not an inert compound. They are dialectic and their interdependence and transformation constitute important objects of study. On the one hand, social power is authorised through exercise of decisions which resonate with generally socially accepted principles of justice, and on the other hand, the decisions made are sanctioned by the social power of the institution dispensing its justice (for a fuller development of this argument, see Lund 2001).

2 Land Registration, Security and Certainty in Niger

In the case of Niger, the promise of registration of customary land rights under the land tenure reform, the Rural Code, created a huge popular demand for registration. However, the state agencies' incapacity to meet this demand opened the terrain for institutional bricolage and competition (see Cleaver, this Bulletin).

Over the past few years the issuing of written deeds as a means of curtailing uncertainty has gained pace. Not only do farmers want tangible papers which validate transactions like sales or land inheritance, they also increasingly want proof that they own land which is already theirs. Basically, farmers who want written proof of their property are facing two options: to apply with the public
administration's Land Register to have a proper
deed drawn up or to apply for a legally somewhat
looser certificat written and signed by the Chef de
canton.

The first option is often recommended by the local
public administration for its precision, its extensive
legal protection and, essentially, for being a step
towards modernisation. Among these protagonists
a shared vision of a French-style cadastre, a full-
blown Land Register, seems to be upheld. The
actual capacity to deliver such deeds is, on the
other hand, microscopic. For example, in the
Arrondissement of Mirriah in the Département of
Zinder in the east of the country, the population is
roughly 500,000 people. During the first few
months after the inauguration of the Land Register
in 1994, just after the adoption of the Rural Code,
almost 600 demands for deeds were launched. The
result was that the Land Register was paralysed. To
this day, less than 50 title deeds have been
delivered, and the Land Register no longer receives
spontaneous demands from the villagers. No one
expects the authorities to
deliver them. The
arduous task of measuring the fields, and in
particular the administration's limited talent for
organisation and planning, seems to account for
this limited success. Moreover, considering the
potentially huge demand, the incapacity to service
a mere 600 indicates the unlikely large-scale
success.

This conducts people to the second option: the
Chefs de canton. The local chiefs' position vis-à-vis
the state is ambiguous. While the social hierarchy
was established and developed well before
colonisation, it was transformed by the French
administration, and the chiefs retained their
administrative and judiciary role far beyond
colonial rule. The French changed the territorial
jurisdictions of the chieftaincy, modified their
numbers, changed the chiefs' prerogatives and
integrated them into the state as administrative
auxiliaries. Hence, the -cantsons are areas of
jurisdiction of the traditional leaders and are
considered collectivités coutumières. As integrated
parts of the administration, the Chefs de canton were
given a central role in maintaining law and order
and collecting tax. The Chefs de canton became the
link between the emerging modern state and the
population.

The legal system is characterised by comple-
mentarity as well as hierarchy, and the Chefs de
canton hold a key position (Raynal 1991). The
complementarity can be seen from the fact that
certain questions fall under the jurisdiction of the
chiefs and others under the jurisdiction of the so-
called modern administration. At the same time,
however, the legal structure is hierarchical, ranging
from the Chef de canton to the Sous-préfet to the
Magistrate and the supreme Court. However, the
formal limits of the legal powers of the Chef de
canton and the Sous-préfet have always remained
somewhat obscure to the average citizen. From
interviews with Magistrates and Sous-préfets as well
as a large number of Chefs de canton, two pictures
emerge: (from above) the Magistrates and Sous-
préfets consider the legal system as fundamentally
hierarchical while the Chefs de canton (from below)
cherish the notion of complementarity. The point is
that their respective jurisdictions are continuously
at stake and negotiated.

The power of the chief over the commoners has
historically been a relationship of authority, where
the chiefs command their subjects. As tax
collectors, the chiefs were given a percentage of
state taxes, and this incentive for zealous collection
has been maintained to this day. However, a new
fiscal tradition was also invented during the
colonial period. While gifts had, of course, been
offered to the chiefs before, it was during the
period of colonisation that tithes to the chiefs were
sanctioned as an obligation. However, Olivier de
Sardan (1984) argues that the tithe is not a
traditional concept, nor a legal notion, a religious
obligation or even a political institution or a land
tax; it is an uncertain wager [enjeu] which may or
may not be pulled off).

Thus, the tithe has no clear normative reference but
is an ambiguous and negotiable sociopolitical
transaction. But tithe payment was linked to the
tenurial status and rights of the chieftaincy. One of
the most frequent justifications for the tithe payment
was that it is the commoner's payment to the chief
for being allowed to cultivate the land, and even
commoner/landowners pay such a tribute. Thus, a
gereneralised version of a tenancy contract was created
for vast tracts of land that were declared chiefs' land.
Despite fervent resistance from the Chefs de canton,
this tithe payment has, however, generally decreased
over the past years, in part due to legislative
measures to oust it.

Nonetheless, the pivotal role as the link to the
population accorded to the Chefs de canton by the
central state gives them an important advantage as
interpreters of custom and justice. It basically
stresses the inalienable pre-eminent right of the
chiefs to control how access to land is distributed.

When a landowner addresses a Chef de canton in
order to get a customary deed, a certificat de détention
coutumière, or another certificate proving
various transactions (renting, mortgaging and
lending, or sales, gifts and division of inheritance),
he (because it is mostly a he) is thus acutely aware
of the historical sociopolitical role of the chief. But
this has to be weighed against the improbability of
getting any kind of proof from the public admin-
istration. The actual character of the piece of paper
being established by the Chef de canton varies
between cantons, but a typically precise one goes
like this:

Customary Deed. I, the Chef de canton of Dogo,
hereby certify that Amadou Ali of Dagodi
Peulh has a field, a field given to him by the
late Canton Chief of Dogo, Moussa Tango
Yerima about 10 years ago, and I also pledge
this gift. Witnesses = Souley Idi and Rabiou
Mahamane. Based on this statement I issue the
present certificate for his use. Dogo December
11th 1997. The Chef de canton Dogo [signed].

It might be added that a third, somewhat curious,
option for written formalisation of rights also
exists. While discussing various issues with the
local magistrate, the following letter from a
Member of Parliament (with the Parliament's
official letterhead, stamp and trimmings) was
passed under my nose accompanied by the silence
of the judge:

1, Member of Parliament, Issa Magagi, certify
by this document to have talked on the
telephone with deputy Sous-préfet of Mirriah
about the land dispute between Bachir Bella
and Harrissou Mahamane of Bahan Tapki. The
matter being closed, the deputy Sous-préfet has
promised to summon the two adversaries again
in October. [signed]

Bachir Bella had later used the letter (which he
could not read) as a kind of proof of his full
ownership of the land in question. The MP had
carefully avoided incriminating himself but had let
Bachir Bella know that with this letter he would
have no further problems.

While the actual contents of these various written
testimonies vary, their common feature is the
reverence with which they are regarded by
ordinary people:

In Niger, mastery of oral and written French is
indispensable for social advancement. Hence
the cult of tarkada. Receipt of a tarkada (written
paper) in Niger is a matter of seriousness and
care. Tarkada is associated with modern
schooling, which is associated with govern-
ment, which is associated with authority. It is
generally not a good thing to be confronted
with (much less learn that one's name is on) a
tarkada, for usually negative things – such as
taxes, or school enrollment, or conscription, or
police convocations – come of it. And of

course, since official forms are written only in
French, the tarkada is unintelligible to most
people. (Miles 1994)

Miles's observation also means that the anxiety that
written documents inflict upon the recipient can be
turned to assurance if one has requested the
delivery of the paper. In such cases, the registration
of property being a case in point, the anxiety is
transferred to potential rival claimants.

However, as both the first and the third option for
written formalisation of property are either unreal,
exceptional or constitute no formalisation at all, let
me return to the formalisation procedure with the
Chefs de canton and discuss its contents and
implications. Despite the recent land legislation,
the Rural Code, certain ambiguities concerning
rights, obligations and privileges still prevail and
are subject to negotiation, entrenchment, assertion
and conflict.

When a citizen addresses a Chef de canton for some
reason, be it for registration of births or deaths, for
conflict resolution, for the registration of property
transactions or merely for a call of courtesy, he has
to give something. This is generally a small amount
of money paid in recognition of his authority. However, in addition to the symbolic recognition of authority, another practice has developed in particular alongside the commercialisation of land, namely what is known as the chief’s part. In case of conflictual division of inheritance which requires the involvement of the Chef de canton, it has been common that the chief (or his officials) would divide the land among the heirs and reserve a piece for himself, which was then immediately offered for sale to (one of) the heirs. This notion of the chief’s part is now also generally applied by the chiefs in case of land sales. The Chefs de canton thus claim it to be their inherited right to receive 10 per cent of the sum paid for the land.

The chiefs’ argument runs as follows. Since the farmer (and his predecessors) did not buy the land but was granted the right to farm it by the Chef de canton (or his predecessors), the farmer was never the actual owner. He merely enjoyed the usufruct protected by the state in the guise of the Chef de canton. How can he, then, sell something which is not his? The chiefs do not have the power to stop, nor the interest in stopping, commercial land transfers, but they hold the opinion that people should pay 10 per cent for the protection the user has enjoyed and that the buyer will henceforth enjoy. The 10 per cent does not figure in any text of law, and it seems to have essentially religious connotations. However, certain chiefs also make reference to the fact that they are supposed to be compensated for managing the civil registry. The law says nothing about 10 per cent or that such compensation should be paid by the citizens themselves. In fact, the state is supposed to remunerate the chiefs for this job, but the state’s virtual bankruptcy has led its administrators to tolerate the emergence of an illegal taxation of citizens for such services.

The other side of the ambiguity stems from the formal legislation and in particular from the decrees and ordinances issued during the military rule of President Kountché (1973–87) (Ngaido 1996; Lund 1998). Generally, these regulations limited, ignored or annulled the chiefs’ rights to control and allocate land. Hence consensual transactions could take place without the intervention of the chiefs and at the concerned parties’ discretion. But such transactions remained essentially unrecorded.

This situation produces dilemmas for citizens as well as for the chiefs and, ultimately, for the state itself. For the average farmer, the interest of having a paper proof of his ownership lies in the protection it yields against predators with hostile claims to his land. However, if the only way of getting this proof is by submitting himself to one such predator by paying a sort of customary tax, which for all he knows may not be a one-off thing but the inauguration of a new tradition, chances are that many will see it as in their interest not to formalise commercial transactions. For the chiefs the stakes may be even higher. After a period involving challenges to their authority in land allocation matters, the land shortage and the popular demand for formalisation of property transactions provides a golden opportunity to extend their source of income from conflictual land transactions to virtually all land tenure transactions, and, more significantly, to reassert and extend their authority in the rural areas. The practice of the chief’s part is technically non-legal but tolerated by the state, and, as a consequence, property is constructed. By claiming what they believe to be their part, chiefs operate at the outer margins of their jurisdiction and their authority is extended and entrenched. Recently, during meetings between the chiefs, the local administration and various development projects in the area, the chiefs put forth the proposition that the concept of the 10 per cent should be formalised and hence, in fact, approved, in the legal texts regulating land tenure transactions.

This produces a dilemma, or rather several, for the state. On the one hand, the state has an interest in having the law, the Rural Code, applied, and part of it attempts to enhance tenure security through the formalisation of hitherto informal, or customary, landholding. This is exactly what is in fact happening, though not in the way it was initially thought to. Whereas the Nigerian state initially thought that it would have to push for land registration, registration has now taken a momentum of its own with one possible consequence being the partial marginalisation of the state. On the other hand, the state has a profound interest in not relinquishing whatever authority it might still command. The institutional transformation ushered in by the increasing importance of written documents is uncertain in itself. The informal formalisation of
property is only valid in so far as the notion of property and the authority of the paper-issuing chief are legitimate and recognised by the protagonists, wider society and in particular other institutions of public authority. And here, the state or the public administration depend upon the Chef de canton and can hardly afford not to recognise their authority in this domain.

People’s individual attempts to adapt to circumstances of land scarcity and periodically rampant land conflicts have consequences far beyond the individual or household level. In their attempt to curtail uncertainty, ordinary people are at one and the same time claimants and producers of public authority. The focus on the everyday practices on the local scene is not to suggest that national institutions, policies and laws do not matter. Indeed, they matter a great deal. They constitute important reference points for action, they bolster the authority of certain groups and they provide avenues of legitimation of property and authority. However, by themselves they establish neither effective authority nor functional property. This is made in concrete processes whereby actors negotiate the substantiation, configuration and representation of institutions, policies and law.

Currently, the attempt to increase security of tenure in many parts of rural Niger has had the unintended aggregate result of accentuating the uncertainty of authority: which of these competing institutions can legitimately validate property? So far, it is an unresolved question.

3 Rights and Institutions as Practice

Certainty, as well as uncertainty, about rights and institutions can hardly be talked about in terms of absolutes. Rights may be successfully vindicated and publicly recognised; but achieved rights are not necessarily rights for good. While the successful property owner may not aim for change but is content with the status quo, a range of processes securing the situation must be engaged. Not only does change require action, but reproduction of a certain state, maintenance of social relations and continuous enjoyment of rights require action as well. The fact that some rights and social relations appear to endure and remain stable is not a sign that nothing is happening. On the contrary, various actors, individuals and organisations are actively reproducing these social relations. There are two points here. First, social institutions, such as property regimes, are not things; they are what people do. And second, institutions are not necessarily robust, solid and enduring; they must be continually reproduced or re-enacted to persist. Sometimes we appear to lose sight of this when we talk about old institutions as if they were perpetuated by some mysterious force. They are no more solid than people make them. Consequently, and contrary to what the language in some of the contributions to the debate on land tenure security might lead one to believe, securing rights is not a single event. On the contrary, we are, in Moore’s (1986) words, dealing with life-time-arenas. One does not eliminate uncertainty or achieve land tenure security once and for all. Rules, predictability and certainty depend on social relationships and how they in turn must be cultivated to continue to yield various rights. This is hard work. While people reflect on their situation and communicate with each other, most of us do it without a complete vision of the possible options and outcomes.

As a consequence, if we want to understand uncertainty, we will have to explore how this phenomenon is perceived by people, and how they organise often quite mundane practices to curtail it. As a corollary, we will also have to analyse who stands to gain from uncertainty and, hence, have an interest in its instigation. As illustrated in the Nigeria case, political instability creates what we could call open moments where political institutions’ roles and privileges are renegotiated, and uncertainty may herald benefits and authority for some to the exclusion of others.

Note

1. All names are pseudonyms.
References


