PEDAGOGIC FACTSHEETS

to gain understanding, ask the right questions, and take action on land tenure issues in West Africa

"Land Tenure and Development" Technical Committee

Creating and securing ownership in Europe

by Joseph Comby[1], December 2010

In Africa, most stakeholders believe that land tenure and registration systems were borrowed from Europe. As a matter of fact, the land tenure systems introduced in the late nineteenth century by colonialists in their respective colonies had never been applied in their countries. The purpose of this brief is to show how Europe created and secured its own ownership system from the old customary rights without ever resorting to the administrative registration of land.

An ownership system different from the system introduced in the colonies

In Europe as in Africa, each country has its specificities. However, what all European countries have in common is that ownership systems across the continent have been based neither on land registration nor on administrative land titling.

In Africa, it is the public administration (local or, more often, national), which replaced the colonial government, that decides on "land titling". The colonial land system, which has served as a model for others (Torrens system), was introduced by the British Empire in Australia in 1858. The Torrens System went even further because it denied the existence of any ownership right prior to the arrival of the colonizer and entrusted the colonial administration with the task of establishing an ownership system from scratch. The aim was to give the new settlers or commercial companies undisputable ownership rights.

Admittedly, the situation changed slightly as time went on. Colonial governments themselves, and then national governments, gradually recognized the need to consider some of the pre-existing rights. However, the basic idea has not changed. It is still the administration that decides whether to recognize ownership rights, following relatively lengthy and costly procedures.

On the other hand, in Europe, no administration (or political authority) has ever determined who owned what. In all European countries, ownership right result from a private transaction between private individuals who can always go to court for arbitration in case of dispute between neighbors or as regards inheritance. No plot of land is registered. Nobody has a "land title" or "residence permit", or "land certificate". The only "paper" available to each owner is a copy of the deed of purchase of the land or the deed showing partitioning of an estate. Ownership has been based on "acquisitive prescription".

The pacifying principle of acquisitive prescription

In Europe, rights over land (ownership rights or other user rights) are based neither on administrative decision nor on reference (through purchase or inheritance) to the lineage of a First Occupant or First Settler. Ownership was based on possession, i.e. a simple statement of fact which, because it had not been contested by anyone, has achieved legal status after a certain period. It is not the occupant's

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obligation to prove ownership over the land, but that of whoever challenges him to prove it. Beyond the "prescription period" any legal action will not become inadmissible in court.

The law usually sets the limitation period at thirty years, which corresponds to a generation. This means that children cannot revive old disputes that their parents had chosen to forget. Acquisitive prescription was an instrument of social peace in old countries that experienced wars, invasions, massacres and rebellions.

Today, acquisitive prescription is seldom applied. Each bill of sale or inheritance merely refers to "the origin of ownership" through previous title deeds, going back at least thirty years before, to provide the buyer with a strong guarantee.

How was this right established?

Ownership rights based on agreements between stakeholders

In ancient Europe, until the Middle Ages, conquerors very often shared the right to exploit the peasantry, who had to remain on the spot. The history of ownership in Europe has been the history of secular conflicts between distant heirs of conquerors who were eager to obtain more from their peasants, and the latter who, generation after generation sought to improve their living conditions. To calm the conflicts, many compromises were reached locally by defining individual rights.

From one generation to another, farmers have gradually been successful in getting the amount of royalties paid a landlord to be defined in writing, and no longer set arbitrarily. They have had their right to hand down their land to their children recognized. They have even won the right to sell to other peasants, if they were, for example, moving into town. As for the landlords, they also began to sell their rights to collect royalties from peasants to other nobles, to merchants and even to peasants who had become rich.

Writing of customs

At a time when written documents were scarce, all these arrangements were based on social consensus, forming customs that varied from one place to another. Not until the early sixteenth century (and the invention of printing) but also under the leadership of central government, were the customs actually written in all provinces and localities.

Local assemblies of notables (often several hundreds) were convened, sometimes several years in a row, to agree on the wording of these customs, in the presence of a representative of the central government. This was how the rules of civil law evolved: settlement of estates, matrimonial regimes, nature of rights on land, meadows, and forests, sales procedures, prescription periods, definition of privileges granted to certain social groups, etc.

What would become peasant ownership appeared first as a seasonal right; each custom determined the time when land use became common, after harvest, and when such use became restricted to the "owner", at the time of sowing. In case of sale, a right of first refusal known as "feudal withdrawal" is often granted to the "Landlord" of the village. In France, out of some fifty major customs, the Custom of Paris gradually became the reference custom which could substitute for silences or contradictions in other customs. It was subsequently amended several times before serving as a basis for the future Civil Code known as the "Napoleonic Code".

Towards four major land systems

From this common mould, different historical developments led to four major land tenure models.

- The **English system** has evolved relatively peacefully after phases of fierce social contests. The former rights of the land owners ("Landlords") have been converted into very long-term leases (150 years or 999 years) with low rents, which have not been updated. Several former aristocratic families now have tens of thousands of acres that earn them little, except when they have been urbanized.

- The **French system** changed more radically during the Revolution of 1789. The "beneficial ownership" of the peasant replaced the "direct ownership" of the Landlord. In the Civil Code of 1804, mention was made only of ownership and "the" owner. To streamline the land tax introduced in 1790 to replace the landlord taxes, a land register was created for the country in about forty years, with the list of taxpayer owners. Indeed, the register merely identified the apparent owner of each plot of land "The register should only indicate ownership. My Code will do the rest, and in the second generation there will be no more legal disputes," wrote Napoleon in July 1807. Owners who did not want to pay the tax had to prove that they were not the owners. This model was subsequently adopted in many other Western European countries.

● The **Germanic system** is an improvement of the French system. Since registers were established much later, the German Empire, in the late nineteenth century, seized the opportunity to give the registers a legal status (which had never been the case in the Latin countries). Neighborhood by neighborhood, village by village, the creation of the register provided an opportunity to identify, under the authority of a judge, all existing land rights for each plot number and recording them in a "land register". Since then, any change in ownership has been recorded in the register.

● The **Russian system**, found in Eastern Europe before the creation of the Soviet bloc, covered areas where the rural land system, instead of evolving with the gradual strengthening of peasants' rights, witnessed the Landlords (the Russian "Boyars") become large landowners, to the detriment of private peasant rights on the best land.

The safety of transactions preceded the establishment of registers everywhere

In a system where ownership right is primarily intended to protect a de facto situation (possession), there is no need for a register to establish legal rights. Lands are bounded by trees, hedges, ditches, roads, etc. In case of conflict between neighbours, the testimonies of old people are resorted to. And, in case of sale, the transfer deeds, written by the scribe who would later become the "notary", simply describe the boundaries of the lands and the name of each neighbour.

The risk is not so much the poor marking of land boundaries, as the fact that it is sold to many different people. Rules governing land sales advertisement are therefore adopted after calling many witnesses. As in Muslim countries, specialized notaries are called in to draft the documents and keep copies at the same time.

There is also the risk that the same property is sold to two buyers, with two notaries, and different witnesses. Consequently, arrangements were made to centralize the custody of all title deeds. In France, the custody of all mortgages was generalized in 1771, whereas the first registers were opened thirty years later and completed around 1850.

Land taxes as land tenure safety factors

An annual land tax is levied in almost all developed countries. Today, however, this tax is lower in Europe, where it is generally based on the notional income associated with the land, than in North America, where it is based on the market value (the amount that could be obtained from the sale of land) actually observed in each geographical area. Historically, this tax has had three major advantages:

● **An economic advantage:** the landowners, who are taxed annually, but do not actually use their farmlands or undeveloped urban lands, are obliged to transfer these lands to other people who will use them, rather than pay a tax for nothing.

● **A moral advantage:** property is no longer considered as a mere privilege. To be an owner means being a taxpayer first. In a way, "ownership carries a price."

● **A legal security advantage:** each tax receipt actually becomes a presumption of ownership or, at least, of possession. In addition, it is often the obligation to pay the tax that puts an end to disputes over land ownership.

It should be noted that unlike the annual property tax, the sales tax tends to generate legal uncertainty, particularly in poor countries where the stakeholders are always inclined to postpone registration of a transfer to evade taxation. ●

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