

BRIEFING NOTES

to improve our understanding and ability to ask the right questions and take effective action on land matters in West Africa

“Land Tenure and Development” Technical Committee

Alternative land tenure conflict management mechanisms: Analytical tools

by Koffi Alinon¹, December 2010

Conflicts related to natural resource management, and especially land tenure, tend to be more and more exacerbated. Judicial systems responsible in theory for the settlement of land conflicts have failed to find efficient solutions in the particular context of African countries, where national legislations and traditional customs coexist. This perspective prompts consideration of alternative land tenure conflict management mechanisms as the appropriate option for these countries.

Land tenure management is a complex and sensitive issue, especially in the context of Sub-Saharan Africa where national legislations coexist *de facto* with deep-rooted customs. This reality is mostly apparent in conflicts between the different users of natural resources. African countries have devolved the powers of land conflict settlement exclusively to the judicial authority. Therefore, whenever land conflict involves individuals or communities, the judge is left to decide according to the law, i.e. he or she simply lets the law take its course.

However, practice shows that this judicial approach to land conflict settlement is not always effective. What happens is that it is not to statutory law that parties refer for justice, and besides, the judge is not the authority they spontaneously resort to for arbitration of disputes. Moreover, there is enough evidence to prove that for a variety of reasons, even the intervention of a judge is no guarantee of subsequent law enforcement.

This brief suggests that in rural areas, land conflict settlement efforts through alternative resolution mechanisms are generally more effective than legal procedures.

Multiplicity and diversity of land conflicts

For the FAO, land conflict “is a disagreement over land and occurs when specific individual or collective interests relating to land are in conflict [...]”. The dispute is likely to owe as much to the general psychology of neighbourly relations as to actual problems relating to the land”. Therefore, land conflicts differ from each other and their intensity varies according to the actors involved, the nature of interests at stake, or the periods when and the places where they break out. All the stakeholders of land systems in West Africa are increasingly concerned by conflicts, as these conflicts tend to increase in number and seriousness, resulting sometimes in the destruction of property and even human death.

The most commonly used typology relies on the category of stakeholders: farmer/pastoralist conflicts; feuding groups of pastoralists; conflicts over fishing rights; native/migrant conflicts; intra-family conflicts; inter-community conflicts; conflicts that pitch the government against the people. An anal-

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ysis of these different types of conflicts shows that they conceal major economic, political and social interests which actually arise on the land scene.

Thus, diverging objectives concerning the use of a common space appear as a critical conflict factor, reflecting the contest between different productive systems for survival in an environment characterized by the depletion of resources. Such conflicts are exacerbated when the mobility of local populations (farmers, pastoralists or fishermen) confers an ethnic dimension to the contest for access to resources. Other factors that aggravate local land-related tensions involve ecological, economic, demographic and social changes. Finally, very critical local interests underlie the control on landscapes. Conflicts, therefore of rival local leaders or communities for the control of patches of land are not uncommon.

The formal conflict settlement system and its limitations

Under the constitutions in force in all West African countries, courts and tribunals are the institutions responsible for the settlement of land conflicts. The judge has the legal power to force on the parties to the dispute the solu-

tion resulting from the administration of the existing land laws. In theory, the settlement of land conflicts through legal procedures has many advantages — impartial procedures, enforcement of a clearly and previously established rule of law and a clearly defined penalty, professionalism of judges.

However, the judiciary is blamed for the enforcement of rules that are uniform and thus seldom adapted to the diverse local conditions. A legal procedure necessarily results in the recognition of a “loser” and a “winner”, which is not easily accepted among rural communities in West Africa. The impartiality of the procedure is sometimes called into question, in view of frequent accusations related to corrupt practices within the judiciary.

Finally, courts and tribunals are overcrowded with land conflict cases, a situation that reflects the limited effectiveness of the judicial system. In addition, justice is not accessible for the poor, due to the costliness of procedures, bureaucratic red tape and limited coverage of the national territory by the judiciary. Even when parties seeking redress at the courts succeed in overcoming these procedural and cost obstacles, the judge’s decisions may not be properly understood or meet the expectations of litigants.

Such findings and the need to better secure rural stakeholders’ land titles in general are the factors that motivated the increasing interest in alternative land tenure conflict management mechanisms.

Definition of alternative conflict management methods

According to the FAO, alternative conflict management methods are consensus-building processes for conflict settlement. These methods were designed to make up for the previously identified weaknesses of the judicial system. Indeed, they are meant to manage the conflict on the basis of common interests and through the identification of convergence points. They are easily accessible and cheaper, and thus affordable by rural populations. Such alternative conflict management approaches are particularly suitable for rural contexts, where the most important thing is less the determination of who is right than the preservation of the public interest and local solidarity, while keeping everybody’s honor safe.

Key alternative conflict management methods

Various methods are adopted as alternative ways of managing conflicts. The major ones as listed and explained below account for what is really done in the field.

- **Negotiation:** The basic principle of consensual negotiations is that the parties are the main actors; they identify their own needs and interests, and agree on mutually advantageous solutions. Negotiation demands much collaboration and is based on the assumption that the parties have the

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Main differences between alternative conflict management methods and formal approaches

Negotiation	Mediation	Conciliation	Arbitration	Courts & Tribunals
<p>Rapid. Original solutions developed by the parties. Collaboration. Flexibility. Parties are owners of the solution. Handseamed. Forward-looking.</p>	<p>Links between the parties who no longer get on. Helps parties determine their own fate. The mediator/conciliator is an interface. Alternative (or appropriate) conflict settlement way.</p> <p>Preservation of relationship. Win/win situation. Confidential. Controllable cost. Rapid. Parties "in control" of their solution (solution "built"). Flexibility. Emotions taken into account.</p>	<p>Suggest the solution.</p>	<p>Winner/loser situation. Costly. Formal. Long. Third party decision. Imposed. Ready-made. Fixing the past. No communication between the parties. Passivity of parties. A process difficult to understand. Emotions not taken into account. <i>Sometimes: coercive and punitive pattern</i></p> <p>A certain choice of the parties as to the arbitrator or the arbitral body.</p>	<p>No choice as to the judge.</p>
Intervention of a third party.				

Source: Alain Hendoux, 2008

goodwill needed to communicate during the entire process. It allows for solutions that may be more satisfactory and easily applicable, as the parties in conflict develop these solutions themselves.

● **Mediation:** In the process of mediation, the parties also play a role, but they are supported by the facilitation services of a third party called mediator. Mediation is a process of voluntary consultation between conflicting parties that is managed by one independent third party or more who facilitate communication and try to help the parties find a solution themselves.

For such a method to be successful, the parties must adhere to a set of common values, which makes it reasonable to expect the parties' compliance with the agreement. The settlement of the conflict should ensure the restoration of interpersonal relations and preserve the "good reputation", or the image, of the parties. Indeed, the need to avoid "losing face" is crucial for the conflicting parties, as shown by several studies.

● **Conciliation:** Here as well, a third party is involved, i.e. the conciliator. The key within this alternative conflict management method consists of

the conciliator's function in reconciling the initially diverging positions of the conflicting parties. The main difference with mediation is that the conciliator makes proposals to help find a solution to the problem, which may then be recorded in writing.

The characteristics of alternative conflict management methods and their differences with formal approaches are recorded in the box below. All three rely on a strong principle: the search for win-win solutions, i.e. solutions taking into account the interests of all the actors in the conflict, solutions by virtue of which none of these actors

will believe he/she is disadvantaged. This is the primary reason that makes them reject arbitrations and court decisions.

Limitations of alternative conflict management mechanisms

There are some similarities between the methods described above and the customary conflict management approach as implemented so far by communities and their leaders. These traditional options have proved effective as people deemed them “fit for them” and, above all, because traditional authorities were able to enforce

decisions. However, the local administrative and institutional framework in most of our countries has changed significantly, especially under the influence of decentralization and with the emergence of new types of stakeholders who have weakened traditional authorities.

It seems more relevant to institutionalize customary regulations in the national legal procedure, for example as a prerequisite for the parties in conflict, before appealing to the judge. This has been the case in Niger, and to a lesser extent in Burkina Faso. Such an option involves controlling customary institutions concerned in order to prevent the often reported cases of abuse.

Alternative conflict management is often blamed for failure to settle all types of land conflict, especially those involving parties whose power and influence differ radically. This is also true of the structural inequalities and glaring injustices against disadvantaged groups which can be resolved only through more far-reaching political or legislative reforms. Finally, the non-binding nature of alternative conflict management methods can make solutions unsustainable in the long run (risk of “resurgence”).

Conclusion

Negotiation, mediation and conciliation are usually resorted to in rural areas, in cases of land conflict. Indeed the settlement of conflicts at the community or village level is common. In fact, bringing disputes before a court is ill-perceived and even sometimes counterproductive. The idea of a neutral judicial institution with a mandate to try and punish only according to a pre-established law is contrary to local actors’ perception and understanding of justice.

As popular wisdom teaches us, “A bad arrangement is better than a successful law-suit”. Alternative conflict management instruments provide flexible frameworks for overcoming land conflicts that hinder rural activities, often for long periods. ●

FOR FURTHER INFORMATION

Documents used for the preparation of this brief

>> HERRERA A. and DA PASSANO M., 2007, *Land Tenure Alternative Conflict Management*, Rome, FAO, Land Tenure Manuals N° 2.
<ftp://ftp.fao.org/docrep/fao/010/a0557f/a0557f00.pdf>

>> HENDOUX Alain, 2008, *Les procédures de conciliation dans les conflits fonciers*, Document de l’Ordre des Géomètres Experts, Belgique.

>> ENGEL A. and KORF B., 2006, FAO, *Les techniques de négociation et de médiation appliquées à la gestion des ressources naturelles*, Rome.
<ftp://ftp.fao.org/docrep/fao/008/a0032f/a0032f00.pdf>

Other resources

>> Alternative Management: www.conflictsensitivity.org

ORIGINAL VERSION IN FRENCH “Gestion alternative des conflits : outils d’analyse”, translated by Lou Leask.

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