

Madagascar and legal pluralism: can customary and statutory law be reconciled to promote women's land rights?

Summary of the online discussion
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Introduction

Launched in 2010, the Gender and Land Rights Database (GLRD) was developed by FAO based on the information produced by civil society organisations, national statistics authorities, academics and other sources in order to highlight the major political, legal and cultural factors that influence the realisation of women's land rights throughout the world. The GLRD is a practical tool for policy makers and advocates of women's land rights, providing relevant arguments and information to support processes aiming at more gender-equitable land tenure.

Expert and civil society contributions are essential to the proper functioning of the database as they help generate quality information to users.

As Madagascar is moving into Phase II of its land reform, it provided an interesting case study of how to promote women's land rights in a context of legal pluralism. The purpose of this discussion was to encourage dialogue and the sharing of information, experiences and concerns about women's land rights security in Madagascar. This first experience with the forum allowed us to assess its potential as a tool for information dissemination.

A number of questions had been prepared to channel the discussion. They pertained to the position of women in customary institutions and their participation in customary law-making processes; the extent to which decentralisation contributed to women's empowerment; the barriers to achieving tenure security for women.

Content of the discussion

Can customary and statutory law be reconciled to promote women's land rights in Madagascar? The discussion has provided some findings on this difficult question. In particular, it appears that the land reform that was initiated in 2005 has strengthened the link between statutory law and customary practices. However, the issue of women's security of tenure is still pending. This is largely due to the lack of gender strategy in the land policy which perpetuates discrepancies between legislation and customary practices.



1. The land reform

The starting point of the land reform in Madagascar is the “Lettre de Politique Foncière” formulated and adopted by the government in 2005. The stated goal of the policy is to bring legality and legitimacy closer together, that is to harmonise the land practices of millions of local actors with the legislation. The objective is to improve the coherence between statutory law and customary law; to bring the legislation – designed at the central level but largely unenforced at the local level – closer to local practices. This is a crucial issue for women who can expect better tenure security.

1.1. Achievements

The Lettre de Politique Foncière initiated two reforms: a legal reform with the recognition of untitled private property and an institutional reform with the creation of local land offices.

Recognition of customary tenure

The legal reform has enabled many local actors to formalise their rights over their property by introducing a certification procedure leading to the issuance of land certificates. Current data show that 80.000 hectares of land have been certified since the introduction of the procedure. The option set out in the law to establish a joint certificate was supplemented by a change in the format of the land certificate to provide space for the wife's name.

Decentralisation and tenure security

The participants recognised that overall the creation of these local land offices brought the land administration closer to people and improved the quality of the service. The discussion highlighted the extent to which the process of land certification is imbued with local customs, with members of the local land recognition committees usually basing their

decision on the views of the local customary authorities when asked to determine customary possession. Nevertheless, a number of factors were identified that still limit the positive impact of decentralisation on women.

- ❖ Local land offices initially relied on external funding from international donors. Their withdrawal in 2009 weakened the decentralisation process.
- ❖ Although the majority of villagers are aware of the existence of local land offices, the less affluent households and female-headed households are the least informed. Besides, few households are aware of the actual value of a land certificate.
- ❖ Another issue that was raised is the training of the administrative staff. In some communes, the lack of awareness among municipal officials in regards to applicable laws on land management, limits access to reliable information thus restricting people's ability to exercise their rights. Regarding the content of the laws, only 15% of households know that a land certificate can be established in several names. Most of the time, the land certificate is established in the name of the husband who simply doesn't think about registering his wife. If a man were to visit the local land office by himself, staff members should be trained to ask about his family status, if his wife consents to him being the sole owner of the property and if he knows of the possibility to register the land jointly in his and his wife's name. It should be noted that to this end, a national institute was created to supervise the training of actors instrumental in the decentralisation process and has been training the staff of the local land offices since 2012.



- ❖ It would be desirable to strengthen the monitoring and control over these land offices.

1.2. Challenges to the realisation of an equitable land tenure

Absence of a gender strategy in the Malagasy land policy

The Malagasy land policy does not yet include a strategy for the promotion of gender equitable land tenure. Developing a gender and land policy would help promote female representation and participation in local structures, by setting up quotas for instance.

Contradictions and discrepancies between statutory law and customary practices

The reform was a major step forward in recognising customary forms of tenure, but there is still a long way to go before the formal legal framework adequately captures the realities on the ground. In particular, the participants have noted a certain number of discrepancies between statutory law and customary practices:

- ❖ Although the law 68-012 confers male and female heirs equal rights of inheritance, in practice it is very important to perpetuate the father's name and estate (mamelona ny anaran-drainy) through male heirs. This law allows the heirs to agree that male heirs will receive the land, whilst female heirs will receive their share in the form of a lump of money.
- ❖ Although the law 2005-019 allows joint registration of properties, in practice, the staff members in the local land offices have not been trained to implement it. Therefore, the staff members indirectly perpetuate local customs which have a tendency to evict women from the certification process, even though they are meant to be the point of contact between

legality and legitimacy and therefore play a crucial part in the implementation of the land reform.

- ❖ The order 74-021 prohibits sharecropping despite it being a widespread practice in Madagascar. Rather than banning it altogether, the law should regulate sharecropping in a way that would secure the rights of both the sharecropper and the owner and ensure that the sharecropper enjoys the usufruct of the agricultural products that he or she harvested.
- ❖ Unions that have not been formalised by a civil marriage contract do not fall under the scope of the family law that provides an equitable sharing of property in case of divorce or death.

1.3. Outstanding issues

The reform did not provide an answer to the question of land categorisation. For instance, is the suppression of the presumption that all untitled land is state property extended to forest land? The notion of land improvement needs to be clarified to identify types of land use that could support a claim for certification. Does slash and burn cultivation or deforestation constitute land improvement?

Colonial concessions remain immutable in practice. These land areas, that were titled in the name of colons who left Madagascar following independence, have seen the settlement of several generations of Malagasy populations. The permanent and evident occupation of these titled but abandoned land areas is rarely recognised despite the existence of an acquisitive prescription in the law. A revision of the applicable legislation should be considered to allow local land offices to issue land certificates on these lands.



2. Women and customary law

In Madagascar customary law is not religious. Family practices and community practices should be distinguished between, as they may be different. Customary institutions are tasked with defining and enforcing social agreements that govern land relations within a community. A better representation of women in these institutions is essential to safeguard their interests.

The *Fokolona* or *Havoria* are democratic assemblies which define and validate customary norms.

The *Dina* are traditional justice forums in charge of dispute resolution. They handle disputes on the basis of the social agreements defined by the *Fokolona* or *Havoria*.

These institutions are headed by a traditional chief of lineage or clan who may be assisted by a spiritual chief.

Customary law is not always incompatible with women's tenure security, as it is characterised by change and is constantly readjusted to fit changes in social relations. Indeed, customs provide an opportunity to strengthen women's land rights through sensitisation and participation in customary law-making processes. Customs are meant to respond to practical concerns that need to be understood if we are to suggest alternative solutions more respectful of women's rights. Formal laws that overlook realities on the ground are often poorly implemented or ignored.

The participants stressed the importance of not challenging the authority of these institutions, as when compared to more educated and sensitised groups, the notion of discrimination would be perceived very differently. Opening a dialogue with customary institutions is the first step towards improving tenure security for women.

3. Women's empowerment and bargaining power

Some projects have revealed an attitude of self-exclusion on the part of certain women. Women must become aware of their role in and contribution to the Malagasy society in order to gain confidence in their ability to handle traditionally male tasks. The Solidarité des Intervenants sur le Foncier (SIF) is currently conducting a research study which will help identify the reasons behind the customs that weaken women's rights and fuel this attitude of self-exclusion. This study will provide a sound basis on which to formulate pragmatic recommendations that won't only be legal, but also educational and economical.

Having their name on a land certificate strongly contributes to women's economic empowerment and to ascertain their position in the couple, as well as in every operation related to the property use and management (lease, sale, sharecropping, credit, crops, building, distribution among heirs etc.). It confers them a bargaining power, an opportunity to express an opinion and to negotiate on these questions. It is essential that they develop their self-confidence to be able to defend their interests. This awareness will encourage them to exercise their rights and improve their tenure security.

4. Options for securing collective rights

Certain options are available to secure collective rights outside of the family:

- ❖ The law 2005-019 offers the possibility to make a collective request for the formalisation of rights over untitled private properties. The law, however, requires the constitution of a users' association that may be a challenge for rural women without any legal support.
- ❖ The formulation of a specific internal policy at the communal level to support the allocation of vacant lands to women. After having made improvements to the land, these women will be able to initiate a certification process.



Conclusion

As Madagascar is entering Phase II of its land reform process, the discussion has provided a timely opportunity to take stock on the progress made and to define focus areas for future developments in the land policy. Among the achievements, the efforts made by the government to tackle the malfunctions inherited from a colonial legal system must be commended. The decentralisation process has largely contributed to a better continuity between statutory law and local practices. However, the land policy clearly lacks a stated objective to promote gender equality and equity in access to tenure security. This absence explains the persistence of challenges, such as the limited availability of sex disaggregated data (on the number of joint certificates, for example) or the lack of sensitisation to gender issues and joint certificates amongst the staff of local land offices. The legal reform should be continued – especially in the area of inheritance – to provide heirs of both genders with equal access to land. It would also be valuable to develop a policy for the allocation of land from the State domain.

The case of Madagascar is not unique and shows a number of characteristics that can be found in other countries with a colonial past. The lessons learnt from the discussion may be applied to other countries confronted to legal pluralism. A key step in the promotion of women's land rights in a situation of legal pluralism is the recognition by statutory law of customary systems. These systems evolve and recognise local rights, be they ownership or use rights. On the ground, private property is not always recognised and access to land is often embedded in social considerations such as status, gender and age. Customary institutions manage the tensions related to land as an individual resource and as a shared resource. These traditional practices are a reality; it would be unrealistic to think that they can be done

away with by simply strengthening a statutory regime whose initial purpose was to serve the interests of colonial powers.

Ultimately, this exercise has shown us once again how important it is to consult organisations in the field to gather information on what challenges women experience in securing their rights, as well as the solutions that have been implemented at each level to address them. The forum of the Land Portal aims to encourage dialogue, transparency and participation on land issues. The information that we collected will feed three sections of Madagascar's country profile: customary law – land tenure and related institutions – civil society organizations. We have received excellent contributions from members of civil society organisations. In the future, we would like to further encourage participation and we are already looking at ways in which this can be done.

We would like to thank all participants for the quality of their contributions:

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To view the full content of the online discussion, click [here](#).

For more information on the Gender and Land Rights Database, please visit the [website](#) or contact Naomi.Kenney@fao.org

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