

Contest for Land in Madagascar

Environment, Ancestors and Development

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BRILL

LEIDEN · BOSTON

2013

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CONTENTS

List of Illustrations.....	vii
List of Contributors.....	xi
Land Competition and Human-Environment Relations in Madagascar.....	1
<i>Sandra J.T.M. Evers, Gwyn Campbell and Michael Lambek</i>	
The Genetic Trail to Madagascar	21
<i>Himla Soodyall, Bharti Morar and Trefor Jenkins</i>	
Don't we all Want a World Filled with "Bright Faces" and "Fat-Cheeked Babies"? Creating the State and Crafting Ideology in Eighteenth Century Imerina	41
<i>Victor Raharijaona and Susan Kus</i>	
Forest Depletion in Imperial Madagascar, c.1790–1861	63
<i>Gwyn Campbell</i>	
Solving Madagascar: Science, Illustrations, and the Normalizing of Fauna of Nineteenth Century Madagascar	97
<i>Tom Anderson</i>	
<i>Lex Loci</i> meets <i>Lex Fori</i> : Merging Customary Law and National Land Legislation in Madagascar	119
<i>Sandra J.T.M. Evers</i>	
Land Rights and Alien Plants in Dryland Madagascar	141
<i>Karen Middleton</i>	
Parenting through Boom and Bust in a Northern Malagasy Mining Town.....	171
<i>Andrew Walsh</i>	

Discourse, Development and Legitimacy: Nature/Culture Dualism of Mining Engagements in Biodiversity Offsetting and Conservation in Madagascar	187
<i>Caroline Seagle</i>	
How the Daewoo Attempted Land Acquisition Contributed to Madagascar's Political Crisis in 2009	221
<i>Venusia Vinciguerra</i>	
Index.....	247

LEX LOCI MEETS *LEX FORI*: MERGING CUSTOMARY LAW
AND NATIONAL LAND LEGISLATION IN MADAGASCAR

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In 2004, the Malagasy national government of former President Ravalomanana introduced a new land registry system under the name *Programme National Foncier* (PNF), with the stated mission of improving the quality of agricultural practices by offering tenure security. With a growing population of over 21 million (World Bank, Data and Statistics, 2012), land is increasingly scarce. Next to its scarcity, land is facing rapid degradation due to erosion and over-use, which incites people to resort to long-standing *tavy* ('shifting cultivation') practices. These, however, are prohibited and subject to corrective penalties (Kull 2004). The anti-*tavy* legislation is closely associated with the former Ravalomanana government plan to improve the Malagasy economy by implementing a land registration system, with a view to increasing taxation revenues for the cash-strapped state treasury. The strategy was to offer Malagasy tenure security over their existing plots, the underlying aim being to ban expansion of agricultural fields through *tavy*.

The government expected land registration to act as an incentive to encourage farmers to invest in the upkeep of lands. Improved land quality would favour intensification of agricultural output while increasing state revenues through World Bank-inspired stratagems designed to encourage self-financing of state expenditures. The World Bank relies on the theories of Peruvian economist Hernando de Soto (2000) who argued in favour of capitalization of developing economies in order to integrate immovable property into legal systems to assess monetary value of such assets: "Because the rights to these possessions are not adequately documented, these assets cannot readily be turned into capital, cannot be traded outside the narrow local circles where people know and trust each other, cannot be used as collateral for a loan, and cannot be used as a share

¹ I am most grateful for the assessments of this chapter by the anonymous reviewers and Karen Middleton.

against an investment” (ibid.: 12). Land title, De Soto claimed, would confer tenure security, encourage further investment in land, and intensify production processes, which in turn would facilitate farmers’ ability to honour their duty to pay taxes over the registered land (cf. Otto 2009: 176).

In practice, however, the land registry system has yet to be fully implemented.² Nor has land registration necessarily triggered increased investment by farmers in their lands. This chapter discusses the Malagasy legislation in terms of land registration and certification and attempts to identify some areas of possible future conflict due to the ongoing cleavages between positive law land legislation (*lex fori*) and land ownership based on custom (*lex loci*).³ It should be stressed right from the outset that the *lex fori* – *lex loci* distinction is analytical here, as in the day to day people draw discursively and practically from varied social and legal frameworks. Kasanga and Woodman therefore refer to such practices as “living laws” because “The living laws of today are derived historically from the indigenously generated living laws which were followed before the inception of the colonial period, although the people have adapted these laws radically to modern circumstances” (2004:161). Also Malagasy legislation contains elements of “living laws” as will be argued below, however, it is important to note that codification of lived practices into national legislation makes such arrangements not only less fluid and adaptable to local practices, but also implies that if a remedy to perceived wrongs is sought, legal conflict resolution falls within the jurisdiction of the *lex fori* courts (see *infra*).

Programme National Foncier (PNF): The Quest to Harmonize Competing Jurisdictions

In 2004, with the support of the World Bank, the Malagasy government launched the *Programme National Foncier*, PNF (Teyssier 2004: 1–3), which is still in force and effect today. PNF envisaged a decentralised registration system, where people could obtain their land certificates in

² In our 2007 publication (Pronk & Evers), we pointed to the conflicts arising out of legal and institutional pluralism. So far PNF has not delivered on the hope that its implementation could mitigate such conflicts (cf. Middleton chapter).

³ *Lex fori* refers to the law of the forum, or court; that is, the positive law of the state, country, or jurisdiction of the court where a dispute is being dealt with. *Lex fori* controls all matters pertaining to remedial or procedural rights, as opposed to substantive rights. *Lex loci* refers to the law of the locality. The *lex loci* or ‘law of the place’ where rights are acquired or liabilities are incurred governs the substantive rights of parties to a dispute.

Local Land Offices (LLO or in French: *guichet foncier*). The Malagasy were formally informed of the new policy goals in the *Lettre de Politique Foncière*, which was ratified by government decree on 3 May, 2005. Four strategies of property reform were set out in this letter: 1) Restructuring, modernisation and computerising of the land registry and topographical database. This area consists of electronic data entries of land registry archives and investment to upgrade land registry equipment and regularise land titles; 2) Improvement and decentralisation of land management. The second area creates a local land property administrative infrastructure, the communal and inter-communal LLO authorised to deliver and process the *certificats fonciers* based on local, public and adversarial procedures; 3) Update of property and domain legislation, to comply with the new property system and to integrate old legal forms of property rights which do not reflect the status of the current land holders; 4) National training programme in property management and communications. This involves the training of local personnel in land titling and security, professional and university training. These four areas are complemented by the *Observatoire du Foncier*, a monitoring and review tool, which oversees actions of the PNF and the impact of measures under the new land tenure policies.

Prior to 2005, all land that was untitled was automatically deemed to be State-owned. The only way to legally secure land was to obtain a title deed delivered by the State land registry services. Under the new land legislation, two major changes have been implemented. Firstly, untitled but occupied land is no longer automatically property of the State. Land claimed by local people may be categorized as ‘untitled private property’. This however in reality does not mean that these legal provisions prevent government claims to land under local use (Evers et al. 2011). Secondly, local government institutions (municipalities) have been granted new powers. By creating a local land registry office, it is responsible for recognizing private property rights and issuing land certificates. The applicant can be an individual but people can also certify their land as a group. Local claims to land are no longer assessed by the State administration but by a local commission⁴ on the basis of pre-existing customary rights (Merlet & Bastiaensen 2012: 26).

⁴ This local commission is comprised of elected representatives of the village and neighbors of the concerned claimant.

The PNF planned to convert provisional deeds of peasants (*petits papiers*)⁵ into official certificates, which in turn could eventually become title deeds. The issuance of these documents would recognise local values in terms of property and the legal procedure within the framework of implementing a long-term plan intended not only to improve land security but also turn the land registry unit of the public administration into a more professional and functioning public service, which had been in steady decline for many decades. At the outset of the programme only about 10 % of land was registered, the existing national registration system was functioning poorly, titles were expensive and the processing period lengthy (Teyssier et al. 2010: 18).

Between 2006 and 2011, 416 Malagasy municipalities established land registry offices (Land Observatory 2011: 22), comprising approximately one-fifth of all municipalities. Since inception, land registry offices have received 120,000 certification requests and more than 60,000 certificates were delivered (ibid.) while the State land services only managed to issue on average 1,500 land titles per year. The average cost of a certificate is 15 USD and the process generally requires about six months. This stands in sharp contrast to the official title deed, which costs on average 507 USD and takes 6 years (ECR 2006, 2008; Teyssier et al., 2009).

It is important to note that the land titling procedure is still in existence, resulting in a dual legal land management system: the formalization of property rights through a title deed falls within the remit of the national government; the formalization of property rights to untitled land via certificates is a new power granted to local government (Teyssier 2010). In spite of these two options, most local land users have yet to secure their land claims through titles or certificates.

Thus, even with PNF, not all Malagasy are integrated into this positive law schema. Despite all the innovative measures, this presents one of the major challenges of the new system, as competing systems of ownership assessment and valuation constitute fertile ground for misunderstandings and disputes between the various stakeholders. These conflicts most commonly appear in three scenarios: 1) private versus private ownership disputes over land. These play out at the local level between families or within families. One likely case might concern an absentee (diaspora)

⁵ At the local level people resorted to their own arrangements called *petits papiers*. These are written land transactions, signed by authorities like the mayor. However, they have little legal value and are solely acknowledged at the local level (Jacoby & Minten 2005: 6–7).

Malagasy asserting title to a specific property lot against generational land users or even an absentee landlord with no title but who claims to be the first to have cleared the land for cultivation notwithstanding use and cultivation of the same land by other families for generations; 2) national versus private conflicts originating in the local perception of land ownership and rights as compared to the positive law definition of it. The state may lay claims to land based on positive law legislation whereas local users might have no title or certificate but may nevertheless lay claim to the land based on the intergenerational use 3) these are indeed analytical divisions as a combination of elements mentioned under one and two is also common (data from Natural Resources research programme directed by Evers which commenced in 2005).⁶

The Legacy of Disputes Originating Prior to the PNF

Before examining the effects of PNF on conflicts and particularly the avenues for resolving them, it is useful to examine potential conflicts rooted in earlier legislation, which continues to apply unless repealed. One statutory example provides us with an insight into the jurisdictional issue. The law states that land property rights are contingent upon ongoing exploitation of land. If rural land having a surface area larger than five hectares is not used for more than 5 years, the property reverts back to the state. This practice would appear to be the Malagasy version of the common law notion of escheat, and civil law of *prescription extinctive*. It should be noted that the five year period under the national law makes holding vacant land a highly precarious situation in rural areas.

Art.3.- Where it has been established that a rural property with a surface area exceeding five hectares has not been occupied personally or at the cost of the owner or his successors or assigns, any such property shall be transferred and assigned to the State, who shall be deemed absolute owner thereof as of the date of such determination. (Law 74-021 of 20 June 1974).⁷

⁶ In addition to the data compiled by the author, fieldwork information in this chapter stems from a joint research programme between the Department of Social and Cultural Anthropology (VU University Amsterdam) and the *Institut de Civilisations/Musée d'Art et Archéologie* (Université d'Antananarivo) financed by ICCO (Dutch Development NGO), which was initiated in January 2005. In this research, sixteen Dutch master students and sixteen Malagasy students jointly carried out fieldwork and research on natural resource management and poverty.

⁷ Throughout the chapter translations of the legislation are by the author.

Following the statutory jurisdiction people can apply for title to land, which is not yet legally owned by somebody else, after a ten year period of cultivation of the land in question.⁸ This might culminate in conflict at the local level between those who have vacated the land, but claim ownership to the land on the basis that their ancestors first cleared the land for cultivation (a classical category 1 conflict referred to above).

Art.18. (*Ord. n. 62-047 du 20.09.62*) – With the exception of immatriculated lands or lands registered in the name of individuals or appropriated pursuant to duly constituted concession deeds or pursuant to public or private laws of general application, any occupant of Malagasy nationality who exercises personal, real, public and permanent control over land, evidenced either by buildings or by actual physical improvements thereupon, and such control is unopposed and uninterrupted, the whole in accordance with applicable custom and usage in the locality from time to time, for a period of ten years prior to the date of determination, may obtain a title deed to such property subject to the terms and conditions set forth in such deed, for property up to the maximum limit of 30 hectares (Law 60-004 of 15 February 1960).⁹

The pre-PNF statutory provisions provided for the acquisition of land title based on local practices; their legislative expression is derived from historical notions of adverse possession borrowed from Western legal systems, and how they recognise the acquisition of title through use and occupation. Thus, it should be noted that even under the pre-reform legislation, there existed considerable tension between generational land users and people who moved away from the areas while still laying claim to land based on first occupation of the territory.

⁸ The general principle of adverse possession or acquisitive prescription for the benefit of persons having improved in an effective and permanent manner all or part of a property registered under the name of a third party was introduced in pre-reform legislation by Decree No 60-146 of 3 October 1960. But, as Razafarijaona (2007) points out in his legislative overview, occupants of lands during both the pre- and post-reform systems have rights which risk being defeated by superior title under positive law – either by way of a right of escheat and return of lands to the public domain, or by virtue of proper title held by a third party, which for all intents and purposes reduces the property rights of occupants to that of mere usufruct.

⁹ The foregoing positive law notions correspond loosely to notions of adverse possession or escheat. See also article 3 of Decree N° 2007-1109 implementing law 2006-031, *fixant le régime juridique de la propriété foncière privée non titrée*, providing for recognition of a property right, “based upon individual or collective occupation which is real, public and permanent, in accordance with applicable custom and usage in the locality from time to time and the zoning of the land”.

What is the Effect of PNF on Landowners' Rights?

As stated above, PNF has the ambition of bringing all property rights within a positive law land scheme based on the registration and certification of land. A brief summary of some relevant provisions is in order, to be able to assess the consequences of PNF in terms of disputes and conflict resolution.

Law 2005–019 *fixant les principes régissant les statuts des terres* (hereinafter the “2005 Act”) sets out the general PNF scheme applicable to all lands. PNF is based on the *Certificat foncier*, a form of land certificate, and the *Titre foncier*, or title deed. The 2005 Act definitions contain provisions that will prove central to the determination of rights in land disputes. The central concepts in this regard are the following:

The *Certificat foncier* “...recognizes a prima facie property right which is enforceable against third parties, subject to contrary proof.” (Article 14 of the 2006 Act contains a similar provision.)

Propriété (Droit de) is the “real property right, which permits its user to use, enjoy and dispose of his property in his entire discretion, subject to existing legislation”.

Reconnaissance locale: “legal procedure established at the local level...to determine and validate the legal status of land, by an ad hoc commission”.

Immatriculation: “legal scheme applicable to real property rights which guarantees a final and unopposable title”.

Article 23 of the 2005 Act states that immatriculation constitutes proof against third parties “of all real property rights” governing property. Article 27 in effect makes registration mandatory, stating that no real property right, lien, mortgage, charge or interest can be enforced against third parties “...unless it has been made public in the forms, conditions and limits set forth in this Act and its regulations”. Article 29 then establishes the *titre foncier* as the supreme point of reference for all property rights in Madagascar, which is “final and unopposable; it constitutes the exclusive point of departure before Madagascar courts for the determination of real property rights, liens, charges and interests charging any property to the exclusion of all other unregistered rights” (emphasis added by author).

Article 30 then states that “Any person whose rights have been violated further to immatriculation may not assert a claim to property title. Solely in cases of fraud, a personal claim lies against the perpetrator of the fraud.” Article 24 of the 2005 law establishes a special procedure which allows for transforming a *certificat foncier* into a *titre foncier*, which seems to imply that despite the land certification option, the title deed still offers more tenure security from a legal standpoint as the *titre foncier* contains non-rebuttable evidence of property rights, capable of defeating any competing claim based on a *certificat foncier* or customary use. However, one important exception exists which may yet play a crucial role in the determination of rights before the Malagasy courts. This is the tomb provision contained in Article 25:

The land registry system applies to real property of any nature, whether including buildings or vacant. Tombs containing sepulchres and their underlying land may be immatriculated, but they remain governed by the special property rules which govern them and which at all times, by their nature, can neither be sold, transferred, assigned and are exempt from execution or attachment.

Despite this provision, it is not impossible to imagine that competing claims to such ancestral lands (*tanindrazana*) can be asserted both by those who have established tombs when they first cleared the land and later migrants who took over the land and established their own tombs when the first comers moved away.

Chapter 5 of the *Loi N° 2006-031 du 24 novembre 2006 fixant le régime juridique de la propriété foncière non titrée* (the 2006 Act) governs the settlement of disputes. Article 24 states that any land disputes arising out of that law “fall under the exclusive jurisdiction of the Civil Courts”. Article 25 however states that “The settlement of litigation or oppositions between individuals related to untitled real property must be first referred to the applicable conciliation and arbitration procedure in the relevant *collectivité*, prior to being referred to the relevant Court.” In the areas where the land offices are operational such local grouping are referred to as local recognition commissions (see *infra*).

Clearly, there are questions to be settled even in the unlikely event that the PNF legislative scheme is effectively implemented in the short term. As stated, the argument for PNF is that it would bring customary landowners into the positive law system, but will Article 25 of the 2005 Act allow customary landowners to effectively resist challenges to their rights by using the tomb as their first line of defence? In short, PNF still seems to represent a perilous enterprise of trying to reconcile fluid

customary arrangements to those of the requirements of positive law codifications.

How is Land Ownership Perceived at the Local Level?

In order to be able to assess local customary arrangements of land access we will examine some local perceptions of ownership and the perceived legitimacy of land claims.

It is common practice in Madagascar that people who have cultivated a piece of land for generations still do not always get their rights to land recognized. As Kull states, “[l]egitimacy applies not only to institutions and leaders, but also to rules. In Madagascar, what is legal is often not legitimate; and what is legitimate is often not legal” (Kull 2002: 66, cf. Evers 2005).

Many local populations do not see the statutory property rights cited above concerning farmers who can lay claim to land on the basis of long-standing cultivation, but who have not themselves cleared the land, as legitimate (*ibid.*). As mentioned previously, in Madagascar, most people acquire land by way of inheritance. There exists a deep-rooted belief in the absolute land rights of the first cultivator of a land and his descendants. This perception is linked to the fact that Malagasy have built their tombs on the land of their ancestors (*tanindrazana*), a sign of family authenticity in the region.¹⁰ Through tombs, Malagasy can have access to their ancestors, who play such an important role in their lives. One needs land in order to build a permanent tomb; the tomb is the portal to the hereafter and the entry point into the process of ‘ancestralization,’ a ritual sequence that facilitates the deceased return to the ancestors. Malagasy take great care in retaining positive relations with their ancestors; this translates into the daily practice of maintaining rich ritual and ceremonial lives. Losing one’s land jeopardises these relations and can have serious repercussions on the living (cf. Evers 2002 and 2006). Many Malagasy even believe that, by losing land, people can become ‘lost people’ – *olona very*, a notion rooted in the country’s history (Evers 2002, Graeber 2007).

Historically, dislocation from land has triggered violent conflicts between the state and local communities. During the pre-colonial Merina kingdom, when internal slavery was implemented on the island to meet

¹⁰ It is important to note that land claims on the basis of tombs are not as straightforward as they might seem as it is not inconceivable that different waves of migrants who succeeded in gaining access to land and building their own tombs, might also lay claim to land ownership pointing to their family tombs.

specific political and economic objectives (Campbell 1991: 111), land was forcibly denied as a means of control, de-historicization and pacification, breaking links between Malagasy people and their ancestors and eventually making them *andevo* (slaves). *Andevo* were 'lost people,' lacking links to ancestral lands and permanent tombs and thus precluded from becoming ancestors themselves – the essence of the Malagasy identity (Bloch 1989; Evers 2002, 2006; Feeley-Harnik 1991; Graeber 2007). Colonial-era policies aimed at export production (see Sodikoff 2008) and forced labour regimes continued to break local links with the land, as many forests were appropriated for logging concessions (Jarosz 1993; Fremigacci 1978). Today, the term *andevo* still implies someone who lacks anchoring in land through tombs, land and history (Evers 2006: 417, Graeber 2007).

Relations with the ancestors are the essence of being Malagasy, entrenched in land practices and *fady* ('taboos') concerning inappropriate land management behaviour (including the sale of ancestral land to outsiders). On a daily basis, people work the land and renew their link with the ancestors, who in turn regenerate both people and land. This vital relation with the ancestors is reflected in the concept of *hasina* described by Delivré (1967: 167–84) as a form of energy innate to existence. References to *hasina* have been encountered by many scholars conducting research in Madagascar (cf. Bloch, 1989: 46–88, Delivré 1967, Dubois 1938, Edholm, 1971). Southall (1986: 414) translates *hasina* as "sacred ritual potency," and considers it to be a central concept for all groups in Madagascar: "Here is one of those pervasive themes which justify emphasis on the essential unity of all Malagasy culture, despite its apparent regional contrasts." Bloch (1989: 65) also writes that the notion of *hasina* is the "kernel of Malagasy thought." Fertility, successful harvests and good health are all ascribed to *hasina*. The belief that ancestors can activate destructive aspects of *hasina* causing, for example, infertility, illness and death, when people do not conform to envisaged ancestral expectations (see Cole 2001) is widespread in Madagascar.

In view of the above, in many settings access to land and lawful jurisdictions for the settlement of land disputes are often still determined within a context where the State and the court system exercise little influence. In such regions, the *tompon-tany* ("masters of the land")¹¹ hold decisional powers with respect to real property issues.

¹¹ The concept of *tompon-tany* exists throughout Madagascar. *Tompon-tany* is translated as 'master(s) of the land' and not 'land owner(s)' because even though most villagers

How People Evaluate Lex Fori Concepts

It is precisely because Malagasy value their land in many more ways than just as a source of livelihood that implementation of PNF is complicated. Furthermore, as we over the years of research in various regions registered, Malagasy view the PNF as a *vazaha* import that tries to appropriate powers which the *tompon-tany* deem to be their sovereign prerogative. Local groups have trouble understanding the Western legal concepts being introduced wholesale into their lives. As the Land Observatory has noted: "What is more, the new terminologies introduced by modern law (tenure, right of way, contrary evidence, etc.) are as many concepts that the members of the local recognition commissions need to assimilate." (2009: 5). As will be explained later, *tompon-tany* usually play an important role in the commissions that advise the Local Land Office.

People often complain that the new land registration system is too complex to understand or is improperly implemented. That being said, outright vocal opposition has often been shied away from in Madagascar. Local groups and leaders are more likely to plead misunderstanding of the new system. (Van Dijk 2010: 54–55). But memories of the French colonial period and its appropriation of lands, forced labour and heavy taxation still seem to weigh on the collective mind. The fact that the PNF is inspired by the French Civil Code hardly favours universal acceptance in the short term. It is scarcely surprising that it has been labelled by some as a "colonial vestige" (cf. *Tany* 2011).

In addition, the implementation of PNF was made possible through financing by international donors using the technique of adopting local land offices. Whereas the law states that the LLO is established upon request of the mayor, NGOs frequently select areas of interest to them. The 2009 Malagasy Land Observatory report states: "While some donors complied with this process, others more heavily favored a project approach aiming to produce rapid quantitative results at the expense of the duration and quality of training, indispensable conditions for establishing true skills within the commune. In this case, the communes were selected without consulting the local authorities beforehand" (page 6). The question then is whose agendas are being realised with the implementation of PNF.

consider *tompon-tany* claims as legitimate, they rarely hold recognised land title deeds. They commonly claim to be the ones who first cleared the land for cultivation.

Whose Tenure Security?

The 2009 report of the Malagasy Land Observatory discloses that: “In three years, the improved tenure security via the land certificate has accomplished the equivalent of 12% to 14% of what land registration achieved in 110 years” (ibid.: 4). But who is actually registering land? Fieldwork on the ground in the Manakara region in the context of the VU Amsterdam/ University of Antananarivo collaboration and fieldwork by Evers in 2007 suggest that those deemed to hold customary ownership also were the most successful in obtaining their certificates with ease: *tompon-tany* and other local power holders. This is confirmed in a more recent study drawing on data of the Land Observatory, which neutralises the optimism in the 2009 report by adding that: “Certification rate is still rather limited (8.2% of the households and 5.6% of the plots) and certification is strongly determined by the households’ wealth” (Burnod et al. 2012: 19).

We also noted that villagers who stood to derive the least direct benefit or with no relations to local power holders (both traditional and those in formal positions like the mayor) were also the most skeptical about the idea that the Land Registration Office would solidify their tenure status. Part of this suspicion may be historical, including more recent experiences with the workings of foreign implanted development projects and backroom deals that local power holders may have struck to facilitate such projects (cf. Kauw 2006, Van Dijk 2010). The Land Observatory recognizes the issue but believes that the answer lies in additional training of the people responsible for the land office, particularly the mayor, and the traditional power holders sitting on the local recognition commissions (2009: 5–7). This suggestion might be helpful but there is a fundamental conflict inherent in the training function. Training the mayor in project aims, concepts and terminologies might strengthen his role as a potential mediator between the project and the villagers but leaves him open to the charge that he speaks a “cultural idiom” that is foreign to the villagers.

Some Local Land Offices have been established without the prior consent of local power holders. Local groups find this an irritant, but this is even more problematic for the traditional local leaders like the *tompon-tany*. Trust and collaboration is a heady challenge in the face of such recent perceived lack of respect in their regard. On the other hand, in implementation processes where the traditional leaders were involved in the LLO from its inception, they might be tempted to see the potential advantages of the project. To stress the importance and influence of local leaders like the *tompon-tany*, they are usually invited by the mayor to sit

on the Local Recognition Commission, whose nomination is confirmed by order of the *commune*. This committee advises the local land registration office on the local legitimacy of land registration requests (see also Malagasy Land Observatory November 2011 report on these procedures). In that role, the *tompon-tany* are likely to be more inclined to give credence to claims that are made by fellow *tompon-tany* rather than to renters of land who might have cultivated local plots of land for more than ten years or even generations. Indeed, the very notion of granting tenure to people who are *mpiavy* (migrants) could be considered anathema. Thus, *tompon-tany* land claims are easier to register as they only would have to find a *modus operandi* among themselves. Others in the village might also be reluctant to oppose such claims if they wish to keep on living in the village.

The Status of Women as Landholders

Gender relations are an important aspect of village social hierarchies, which necessarily impact on land certification, practices. The PNF legislation is touted as being gender neutral. The Land Observatory mentions that 14,403 women (Malagasy Land Observatory website 13 December 2012) have obtained a land certificate. Most NGO's financing the Land Registration offices clearly target women as beneficiaries of the projects. There is a logic to this in the fight against poverty, as women who head households are deemed to be the most vulnerable for living in poverty as the study of Stifela et al. demonstrates: "we found that female headed households suffered 6–14% lower consumption." (2010: 594). The question arises as to which women would benefit from land registration.

In many Malagasy rural settings, land ownership of women is something that is somewhat problematic (Burnod et al. 2012: 16), particularly in the Manakara region where we followed land registration projects over a period of five years. Patrilineal heritage systems made men the heirs and cases of women actually inheriting land were rare (Kauw 2006: 53). They were usually widowed women who theoretically were under the legal duty to return the land back to their family but were on occasion offered the option to continue cultivating the land and passing it onwards to their sons. Actually registering such a plot of land is a potentially dangerous enterprise. During 2007 fieldwork in the Manakara region, two cases where women obtained a certificate were brought to our attention. One of these women was said to be poisoned by her in-laws and the other was socially ostracised and expelled from the village. She left the countryside

altogether and survived with her children begging in the streets of Manakara.

In 2010, Aliene van Dijk (page 49) noted that by March that year, 57 women in the Manakara region had obtained a land certificate. They appeared to be members of well-to-do families, women with better education and presumably with more knowledge of PNF. Also, it is not to be excluded that social links with the mayor and other people of authority might have facilitated granting of the certificate. Possession of the certificate was no guarantee that they were free to determine the fate of their land in terms of management or selling it, as they remained subject to social constraints imposed by the local cultural system of authority of (elderly) males. The above listed predicaments of women that we noted in our research are confirmed in a study of the Land Observatory (June 2011), which states that while according to *lex fori* legislation women should have equal access and rights to land, in reality *lex loci* customary arrangements prevent them from claiming such rights (page 39).

Conflict Resolution

In the first instance, the local *tompon-tany* might find it in their interest to collaborate with the land registration project. As some *tompon-tany* during our studies pointed out: “Yes, the state is behind us and confirms that we are the rulers and owners of the land in this region” (data fieldwork Evers 2007). However, by the mere act of registering, *tompon-tany* may have acceded, or in legal parlance, attorned to the jurisdiction of the courts. Before land registration, local leaders settled land conflict at the local level. In many regions authenticity demonstrated through the family tomb of a particular family was an important factor in assessing conflicts (the domain of *lex loci*). With the new system *tompon-tany* theoretically can lose their land, for example by way of mortgage foreclosure, or through the large-scale land acquisitions increasingly common in Madagascar and elsewhere in Africa (see Seagle and Vinciguerra in this volume). And under Articles 29 and 30 of the 2005 Act, even where a complainant proves to the satisfaction of the courts that such land was obtained through fraud, the plaintiff would receive a money award, but not necessarily return of his land.

So in the short term, the PNF allows a say in securing substantive property rights because the *tompon-tany* themselves often make up the review body (local recognition commissions) which assesses the validity of

claims concerning land certification. However, once confirmed, the courts will become the exclusive arbiter of dispute resolution in the subject matter if it cannot be locally resolved. This change of forum is capital. The transfer of jurisdiction risks undermining the supremacy of the *tompon-tany* and a shift towards a positive law system and everything which that implies – taxes, conveyance of land, granting of mortgages, liens and similar security interests, notwithstanding the consolidation of power of the *tompon-tany* in the short term. As the study of Stifela et al. on the evolution of groupwise poverty in Madagascar between 1999–2005 demonstrates, the land rich flourish in remote areas, and benefit more from land investments and economic opportunities (2010: 595). Thus, while potentially bringing tenure security for some, PNF might contribute towards elite appropriation of the system and trigger deeper divisions within communities.

Customary arrangements of land tenure undoubtedly give rise to disputes and intensification of local hierarchies. PNF, however, has its own challenges and might actually increase local land conflicts and social cleavages. The Land Observatory also has observed that PNF has failed to provide a proper forum for such conflicts. In theory, people with land certificates engaged in a land conflict can seek a solution in the Malagasy courts, but villagers often view the courts as corrupt, procedures as cumbersome and complex and costs as prohibitive. However the Land Observatory report (2009) quotes a deputy mayor in the *commune* Amparafaravola district (Alaotra – Mangoro region), stating that the number of land conflicts for which arbitration was sought at the *commune* level had almost tripled since creation of the Land Office in October 2007: “The opening of the Local Land Office (LLO) pushed inhabitants to bring forth latent conflicts that were real but that they had attempted until then to resolve more or less clumsily within the family or neighborhood” (Land Observatory 2009: 5). However, the report then mentioned that “most LLO prefer not to process contentious requests and do not wish to take on the role of proximity arbitration body” (ibid. 6). Thus PNF does not offer efficient and effective conflict resolution mechanisms concerning land matters.

Development Means Taxation

The causal link that Hernando de Soto (2000) predicted between land registration and agricultural investment (via bank loans using the land as collateral) has yet to materialize. As Jacoby and Minten (2005: 15) point

out “agricultural lending as well as the establishment of a legal framework for mortgaging land, [are] conditions which are not generally present in Sub-Saharan Africa.” Also farmers are often not deemed credit-worthy by banks (Otto 2009: 188). The increase in investment and production are not realistic results of land registration in the African context, as Jacoby and Minten (*ibid.*: 1) substantiate in their Malagasy study, they found “no significant effect of having a [land] title on plot-specific investments and corresponding small impacts on land productivity and land values”. Lack of money for investment is not the only factor crucial in understanding Malagasy expenditure patterns concerning land; for them land actually has not just an economic value. Other non-economic factors, as argued above, are at the heart of farmers’ decision-making patterns concerning their: 1) ability to register land; 2) willingness to register land; 3) allocation of their budget to land. For the same reason, even the hope of the Malagasy government and its international donors that registration would pave the way for taxation of the land turns out to be a hazardous route, precisely due to the fact that Malagasy conceptualize and value their land very differently from the international stakeholders involved in the land registration projects.

PNF documentation clearly links the programme to the ‘development’ of local communities through increased productivity and investment by using the land as collateral. The taxation system in theory should bring ‘development’ to the villages. Even in the literature of the land observatory ‘development’ is presented as the result of taxation as the benefits of the new taxation system would be used for local communities: “Among other things, the Land Policy’s ultimate goal is land tenure management conducive to the development of decentralized territorial governments via the provision of territorial management and taxation tools.” (2009: 3). How such money precisely should be allocated and what ‘development’ would entail is not detailed.

With regard to decentralisation of taxes, the Land Observatory report does disclose a jurisdictional tangle, which if left unresolved is sure to give rise to disputes. While land registration of certificates is decentralised under the PNF, the national land title system is still in service as well and there appears to be a dearth of information flow between the two systems. In the words of the Land Observatory: “Yet, maintaining centralized land management is a complete mismatch with a decentralized land taxation system. Unlike land certificates, the information on land titles does not go through the communes; the communes do not know the status, occupation, and size of titled lands, or even the holders of taxable rights.”

(ibid.: 8) In a November 2011 assessment study of the PNF the lack of a proper taxation system was again deplored by the Land Observatory (page 39). Even presuming a functional taxation system, the willingness of farmers to pay outstanding taxes is far from assured, as they might buttress their claims to land with reference to tombs and ancestors. As a *tompon-tany* landowner in the Ambalavao region explained during 2007 fieldwork:

You think we are going to pay taxes on our own land to the State? This is the land of our ancestors. We will never pay money for anything that already belongs to us. This is surely a *vazaha* idea. Just like before, they are coming to steal our money and our land. I warned the other *tompon-tany* to take measures so *vazaha* do not come to steal our land. After that they will want us to work as *andevo* for them. That never!

The Land Observatory has contemplated a series of measures, which they refer to as user incentives, designed to encourage the payment of property taxes: “temporary tax exemptions for certified lands, massive reduction of the cost of certificates during a set period of time, etc. On the contrary, unregistered land could be subject to higher taxation.” (2009: 15) Based upon our research and the studies of the Land Observatory (see November 2011 report), we suspect that the *tompon-tany* quoted above is not alone in his views on the reformed taxation system. His view that *vazaha*, foreigners, might come to steal their land is not uncommon in Madagascar, a belief anchored in both the land confiscation practices of the colonial past and more recent phenomena.

When the Foreigners Come

Despite the division between State land and ‘untitled private property’ (derived from 2005 legislation), PNF potentially can give rise to a phenomenon that could make the worst fears of Malagasy come true: the prospect of losing one’s land to third party interests, whether from inside Madagascar or from foreign interests, thereby severing the link with the ancestors. The state might indeed label land that is not registered as open for foreign investment and lease it to foreign companies, who commonly enter the market through Malagasy subsidiaries (Evers et al. 2011).

Ravalomanana managed to increase national growth figures while leasing land to foreign companies for mining and agricultural purposes (Ploch 2011: 11). Simultaneously, conservation NGO’s continued to co-manage Malagasy rainforests (including delegated management

structures like the Wildlife Conservation Society in Masoala). Even going so far as insisting on legislative changes to *tavy* practices, while stimulating land registration and levying penalties against trespassing in 'national' parks (Kull & Laris 2009). Mining companies have been granted access to local grounds with the discursive legitimization that these lands are 'unused' or 'unproductive' while local farmers are portrayed as ignorant and desperately poor. Such land deals are often framed as a 'development opportunity' for the state and local communities, with promises of education, 'economic growth' (and thus improved livelihoods), technology, infrastructure, education and healthcare, and alternate income-generating activities (e.g. employment on concessions, ecotourism) increasingly seen as 'trade-offs' (or compensation) for the lease or sale of large swaths of arable land (Smaller, Carin and Mann, Howard 2009; IIED and FAO 2008, Seagle in this volume).

Ravalomanana's economic agenda came to a grinding halt when news became public of the South Korean company Daewoo's proposed 99-year lease of 1.3 million hectares of land meant for agricultural production. It sparked massive protests and political dissent within Madagascar, providing a platform for the protests led by Andry Rajoelina in 2009, which culminated in a *coup d'état* (see also Vinciguerra in this volume). A reason why Rajoelina had been so successful in mobilising Malagasy in support originates in his rhetoric on foreign investors like Daewoo's attempts to destroy local land based livelihoods by the claiming of ancestral lands, thus harnessing what is probably one of the greatest fear of many Malagasy.

The protest against the Daewoo case eloquently illustrates the extent to which land matters in Madagascar are anything but a trivial matter. The obvious example is the tomb. Which indeed can be used as a pervasive rhetorical strategy to assert claims in land competition. From this standpoint, the tomb is then presented as the quintessence of interconnectedness, a medium intimately related to kinship networks and heritage. Its very existence is dependent upon possession of land, and the tomb as symbol and icon is emblematic of existence itself – both socially and ontologically, so powerful as medium, that it is able to sweep aside *lex fori* notions of ownership. The reference to tombs in the legislation does little to safeguard villagers from losing their ancestral land when the state claims the land for purposes other than subsistence farming. The prospect of fighting this in court is scarcely an option for most farmers.

The political crisis had enormous consequences for Madagascar as international aid programmes of NGO's, the United States and the European community were initially put on hold and spending strategies reconsidered. As the World Bank Madagascar country brief highlights: "Large fraction of official aid – which represents 40 percent of the budget and 75 percent of the public investment program – remains on hold. That has led to significant cuts in investments, a decline in the delivery of social services and further deterioration of growth." (World Bank 2012). Madagascar remains highly depended on outside donors. The Land Observatory also observes this dependence and already in a 2009 urged donors to continue their institutional, technical and financial support for the land titling programmes. Currently, the political crisis is ongoing with no solutions on the horizon. In the meantime, Malagasy poverty continues to be endemic, and optimism for a better future is fading. Madagascar's poverty ratings register increased poverty levels by above nine percentage points between 2005 and 2010, reaching 77 percent of households, the highest rate in Africa (World Development Indicators, 2011). Many Malagasy are driven back into farming (Stifela et al. 2010: 31), renewing the pressure on land and potentially exacerbating conflict at the local level.

Conclusion

The central aim of the PNF holds out the promise of uniformity, predictability and that it ultimately will reduce tensions and disputes in the field of land access and ownership. The PNF, however, at this point suffers from three major structural impediments. First of all, the system is widely misunderstood. Secondly, the system is only partially implemented and it remains to be seen whether it is being implemented in the same manner from one locality to the next. Thirdly, the PNF is not enforced at this point.

Added to these three structural difficulties is the multitude of actors and stakeholders to land at the national, local and international levels, ranging from village elders to conservation groups to mining companies to members of the Malagasy diaspora. The recent introduction of mega-land transactions into the landscape creates another variable impacting on power relations within the country.

Finally, and crucially, PNF is far from universally accepted. Although presented as the comprehensive, watertight system that will finally bring certainty to land relations, in all likelihood the contrary result can be

expected. In fact, if one were to ask the question: what do Malagasy agree upon generally, the answer most likely would not be the PNF, but quite something else. For there are two things that are still used as powerful discourses by Malagasy laying claim to land, elements that they deem to be universal Malagasy tenets when it comes to land: 1) tombs and the underlying land are sacred. 2) land comes from the ancestors. Any violation of these fundamental beliefs will bring ill fortune to those who are responsible for the alienation of land from the ancestors.

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