

CHAPTER 12

CUSTOMARY LAND TENURE AND CONTROL OF DEALING

1 Meaning of Custom

1.1 Our purpose in this chapter is to discuss the part that registration of title can play in regard to ‘customary land tenure’, a phrase which is widely used but seems to have no universally accepted definition. Many authorities, arguing with justification that English legal terminology is apt to be misleading when applied to customary concepts of land tenure, have evaded the issue and have tended to define customary land tenure merely by describing the various rights and restrictions applicable to the holding of land in the particular area of their studies – an example which we ourselves presently follow. Legislatures, when they have been brave enough to attempt a legal definition, have done so by reference to such well-worn expressions as ‘current customary usage’, ‘customary law’, or ‘native law and custom’.¹ These expressions, however, themselves require definition; and even where such definitions exist – Ghana, for example, defines customary law as “rules of law which by custom are applicable to particular communities...”² – there still remain many unanswered questions, not least with respect to the meaning of ‘custom’.

1.2 A law lexicon defines ‘custom’ as “unwritten law established by long usage”,³ but how long must a custom be used before it is established as law? Must it date back to the proverbial ‘mists of antiquity’ or does the general acceptance of a recently established practice entitle it to be recognized as enforceable custom?

1.3 English law distinguishes between *legal custom* which is operative *per se* as a binding rule of law, independently of any agreement on the part of those subject to it, and *conventional custom* which is legally binding because it has been expressly or implicitly incorporated in an agreement between the parties concerned; for example, he who makes an agreement in any particular trade or market is bound by the usages of that trade or market.

1.4 We are here concerned only with legal custom and, in England, to have the force of law a custom must have existed for so long a time that “the memory of man runneth not to the contrary”. The limit of human memory is determined by a curious rule of law which still remains in force; it was arbitrarily fixed at the date of the accession of

¹ For instance, the Malawi Land Act 1965 defines customary land as “land held, occupied or used under customary law”. The Kenya Land Adjudication Act 1968 in defining ‘groups’ also refers to “land under recognized customary law”. The preambles to the Land and Native Rights Ordinance of West Cameroon and the Land Tenure Ordinance of the Northern State of Nigeria contain the phrase: “Whereas it is expedient that existing native customs with regard to the use and occupation of land should. . .be preserved”.

² Interpretation Act 1960 s18(1)

³ Motion *The Pocket Law Lexicon* 110

Richard I in 1189, and so if it can be proved that a custom has not existed at any time since the twelfth century it will not receive legal recognition. Salmond's comment is pertinent to our theme:

“It is not difficult to understand the motives which induced the law to impose this stringent limitation upon the efficacy of customs. It was designed in the interests of a uniform system of common law for the whole realm. Had all manner of recent customs been recognized as having the force of local law, the establishment and maintenance of a system of common law would have been rendered impossible. Customary laws and customary rights, infinitely various and divergent, would have grown up so luxuriantly as to have choked that uniform system of law and rights which it was the purpose of the royal courts of justice to establish and administer throughout the realm.”¹

1.5 This sensible English approach is in striking contrast to the attitude of some developing countries where, unhappily, there seems to be no fear of the ‘choking luxuriance’ of customary law; on the contrary, one of its principal merits is held to be the flexibility with which it can grow. “Research shows that even in the pre-colonial period customary laws were in constant movement... Customary law is characteristically changeable or flexible rather than rigid, and although conservative in some things (marriage taboos, say) is innovatory in others. Since the inception of the colonial period this natural characteristic has been intensified in the hothouse atmosphere created by the arrival of western law, economies, education and the like.”²

1.6 Here then has been a rich field not only for judges and lawyers of all kinds but also for anthropologists, and massive indeed are the piles of punditry that have accumulated on the subject. Yet, “although custom is an important source of law in early times its importance continuously diminishes as the legal system grows”,³ and in many countries custom has already been largely replaced by case law or statute. This process is inevitable but is seldom recognized in developing countries because many people tend to regard as customary law what is in reality case law or statute; the historical source or origin of a law is confused with the legal source from which it obtains its sanction.

2 The sources of law

2.1 Law obtains its sanction from three sources: it is enforced because it is (1) customary law, or (2) case law, or (3) enacted law — and customary law tends to become case law and then enacted law. Thus, at first a custom (or ‘usage’) is enforced in the customary courts, or even merely by social pressure, for no reason other than that it is practised locally and is recognized as legitimate by the community. As soon, however, as a formal court system develops the custom will derive its legal force from precedent, i.e. from the fact that the court has already decided that particular issue in a certain way.

¹ *Salmond on Jurisprudence* 203

² *Allott New Essays* 150

³ *Salmond on Jurisprudence* 189

Historically the law remains ‘custom’, but legally it becomes ‘case law’ or ‘precedent’. This indeed is the normal process of evolution. The stage when “being unwritten, customary law is based neither on a code nor upon a case law of precedents” must soon pass. In view of the rapid advance in education and literacy, and also in the mechanics of record-keeping it should now seldom be true that “the records of one customary court are not seen by members of another court and the judges rarely read (and still less frequently understand) a High Court judgement in a case which has been taken on appeal from their own court, though this record is usually pasted in their own record book”.¹ Chaos would ensue if conflicting judgments were to be given on similar facts.

2.2 Case law, however, has to be extracted from records which themselves may be inadequate, and it then has to be interpreted and applied. The tendency is to replace it by some sort of codification; the historical source of the law is still custom, but it becomes enacted law, deriving its legal force from its formal declaration by some authority in the body politic having recognized power to legislate. Enacted law of this sort has obvious advantages over case law. “Statute law is, in general, brief, clear, easily accessible and knowable, while case law is buried from sight and knowledge in the huge and daily growing mass of records of bygone litigation. Case law is gold in the mine – a few grains of the precious metal to the ton of useless matter – while statute law is coin of the realm ready for immediate use.”²

2.3 Judge-made law has another evident shortcoming. Natural justice demands that a law should be known before it is enforced; but case law operates retrospectively since it is the judgment which makes the law whilst applying it to facts that have already occurred. Jeremy Bentham told us how the judges make it: “Just as a man makes laws for his dog. When your dog does anything you want to break him of, you wait till he does it and then beat him. This is the way you make laws for your dog, and this is the way the judges make laws for you and me.”³

2.4 The extent to which English courts will go in making law is quite astonishing. For example, owing to the legal rule mentioned in paragraph 1.4 above, an easement, which had been enjoyed for a reasonable length of time and so deserved to be legally recognized, might be lost if it could be shown that it had come into existence since 1189. The courts therefore “in course of time evolved the very questionable theory of the lost modern grant”;⁴ it was presumed that an actual grant had been made at the time when enjoyment began, but that the deed had been lost. Chief Justice Cockburn described the development of this process in forthright terms: “and as Parliament failed to amend the law the judges set their ingenuity to work, by fictions and presumptions, to atone for the supineness of the Legislature, and to amend, so far as in them lay, the law which I cannot but think they were bound to administer as they found it. Juries were first told that from user, during living memory, or even during twenty years, they might presume a lost grant or deed; next they were recommended to make such presumption; and lastly, as the final

¹ Lloyd *Yoruba Land Law* 17

² *Salmond on Jurisprudence* 129

³ See *ibid* 127n(q)

⁴ *Cheshire* 529

consummation of judicial legislation, it was held that a jury should be told not only that they might, but also that they were bound to presume the existence of such a lost grant, although neither judge nor jury, nor anyone else, had the shadow of a belief that any such instrument had ever really existed.”¹ Nevertheless the doctrine still exists: it “was elaborately considered and endorsed by the House of Lords in *Dalton v. Angus & Co.*,² and is now unquestionable”.³

2.5 However, the whole tendency in modern times is towards codification. “In this respect England lags far behind the Continent. Since the middle of the eighteenth century the process has been going on in European countries, and is now all but complete. Nearly everywhere the old medley of civil, canon, customary, and enacted law has given place to codes constructed with more or less skill and success. Even in England, and the other countries to which English law has spread, tentative steps are being taken on the same road.”⁴

2.6 In a number of countries (Northern Nigeria, Ghana, Sierra Leone, Tanzania, among others) express provision has been made for the declaration of customary law by the appropriate traditional body or local authority.⁵ For instance, s9A of the Tanzania Judicature and Application of Laws Ordinance 1961 provides that a local council may make a declaration of a local customary law or recommend its modification, and the Minister, if satisfied, may cause the declaration or modification to be published. This procedure has been extensively employed by District Councils in Tanganyika in the drafting and promulgation of ‘unified declarations of customary law’.⁶ These declarations, when they have been gazetted, have the force of law which is, of course, ‘enacted law’, though it is still called customary law. It is obvious, however, that this procedure is not really suitable for producing land law fitted to modern conditions. Clearly it can provide no substitute for the uniform national law we advocate.

3 Distinctive features of customary tenure

3.1 As we have already said, it is not easy to find a satisfactory formula that will adequately define ‘customary land tenure’, though the following definition at least carries the authority of the United Nations:

“The rights to use or to dispose of use-rights over land which rest neither on the exercise of brute force, nor on evidence of rights guaranteed by government statute, but on the fact that they are recognized as legitimate by the community, the rules governing the acquisition and transmission of these rights being usually explicit and generally known though not normally recorded in writing.”⁷

¹ *Bryant v. Foot* (1867) L.R.2 Q.B. 161 at 181

² (1881) 6 App. Cas, 740

³ M & W 844

⁴ *Salmond on Jurisprudence* 129

⁵ See Allott *New Essays* 289

⁶ *Ibid* 290

⁷ *Progress in Land Reform – Fourth Report* (1966) 165

3.2 This definition, however, leaves wide open the vital question of how the rules are arrived at; also, it is very doubtful if many practical administrators will agree that such rules are usually explicit; on the contrary, it is the uncertainty of these ‘rules’ that gives rise to one of the most valid criticisms of customary land law. As a definition, therefore, it does not appear to be very satisfactory but, rather than volunteer one ourselves, we (like many others before us) consider that it will be safer, and certainly less confusing, if we describe the essential nature of customary land tenure instead of attempting to define it.

3.3 It can be generally accepted that in their earliest beginnings all societies regarded land as belonging corporately to the social group, whether this was a tribe, village, lineage or family. This traditional concept is eloquently expressed in the much-quoted saying of a West African chief: “Land belongs to a vast family of which many are dead, few are living, and countless numbers are still unborn.”¹ If we examine this concept in the light of our analogy of the container and the bundle of sticks,² we can at once perceive the difficulty of trying to reduce tenure of this kind to terms of ownership recordable in the names of living persons. The social group, in so far as it can be identified, owns the container and each member of the group, merely by virtue of his birth, acquires a share in that ownership, yet still only in the capacity of one of a constantly varying number of trustees for future generations. This concept is not peculiar to ‘customary tenure’. As we have seen, ‘settled land’ in England had the same characteristic of being fixed in the family, present and future – indeed this was the objective of the settlement – and nobody was legally capable of disposing of settled land, until legislation arbitrarily gave this power to the tenant for life.³ In customary tenure, however, there is often difficulty in identifying the social group, for frequently there are overlapping and interlocking rights in a hierarchy which may vary not only from country to country but from district to district and even within the same district. This is the factor which gives customary tenure its diversity and makes local investigation always necessary to ascertain the situation in any particular area.

3.4 ‘Customary tenure’ is sometimes called ‘communal tenure’, because of this ‘community ownership’, but land in customary tenure is seldom communally occupied and used by the group as a whole, except in respect of grazing rights. Elias considers that the term ‘corporate’ would be an apter description of this system of land holding “since the relation between the groups and the land is invariably complex in that the rights of individual members often co-exist with those of the group in the same parcel of land. But the individual members hold definitely ascertained and well recognized rights within the comprehensive holding of the group.”⁴

3.5 Some simple examples of these rights are the right to build a house, the right to grow crops and, above all, the right to exclude all other persons from the land. In strict

¹ Attributed to a Nigerian chief by Meek *Land Law and Custom in the Colonies* facing title page, and to a Ghanaian chief by Ollennu *Customary Land Law in Ghana* 4

² See 1.4.4

³ See 1.6.2n*

⁴ Elias *The Nature of African Customary Law* 164

customary law such rights as these may be individually exercised only with the consent of everyone else in the group; in practice the group works out a method of giving this consent – usually through the head of the group or its land authority – and as development advances, the individual tends to acquire more and more freedom from group control until it may be said that individual ownership has been established.¹

3.6 Many communities have in the end reached a position in which individual dealing under so-called customary law is a regular practice and is supported by case law or even codified law, but the intervening period has often been filled with prolonged litigation and much uncertainty. Indeed, it seems that this position is only reached in the teeth, as it were, of custom. A West African lawyer writes:

“Strict and orthodox native law and custom does not recognize the sale of land and the literature on this point is abundant. Almost everywhere, however, modern dealings compel a relaxation of the old systems and sales of land are now part of the normal occurrences of everyday economic and legal activities. It is, however, incorrect to say that the selling of land started with the introduction of the English law, as this form of dealing with land was the result of the necessary reaction of society to contemporary circumstances.”²

3.7 We might indeed wonder how a rule of “strict and orthodox native law and custom” came to be completely reversed without legislative intervention. But perhaps the rule was not quite so positive as is supposed. “Where there is no pressure on the land i.e. when it is literally as free as air and water, there is obviously no more market for it than there is for air and water. It is, therefore, true as a fact that ‘there is no sale of land’, just as there was no sale of land among the early Britons, but it is obviously questionable to say that ‘the sale of land is forbidden’, for this would presume a custom for the expression or formulation of which no opportunity has yet arisen.”³

4 Individualization of customary tenure: natural evolution

4.1 Customary tenure is, in fact, in a constant process of evolution, and the trend is usually towards a greater concentration of rights in the individual and a corresponding loss of control by the community as a whole. The term individualization “might suitably be confined to practices which deprive the community of its traditional right to resume possession of lands which have ceased to be beneficially utilized by the families permitted by customary usage to occupy them.”⁴ Lugard described the process in a passage which has been much quoted:

¹ See Obi *The Ibo Law of Property* 43

² Coker *Family Property among the Yorubas* 30

³ S R Simpson ‘Land Tenure: Some Explanations and Definitions’ 6 *Journal of African Administration* (April 1954) 51

⁴ Lord Hailey ‘The Land Tenure Problem in Africa’ *Journal of African Administration Special Supplement* (October 1952) 7

“In the earliest stage the land and its produce is shared by the community as a whole; later the produce is the property of the family or individuals by whose toil it is won, and the control of the land becomes vested in the head of the family. When the tribal stage is reached, the control passes to the chief, who allots unoccupied lands at will, but is not justified in dispossessing any family or person who is using the land. Later still, especially when the pressure of population has given to the land an exchange value, the conception of proprietary rights in it emerges, and sale, mortgage, and lease of the land, apart from its user, is recognized...These processes of natural evolution, leading up to individual ownership, may I believe, be traced in every civilization known to history.”¹

4.2 This description has been challenged, and indeed it has been suggested that in some societies tenures have in fact evolved from the opposite direction, from individual to communal rights. In Kenya, for example, it has been said:

“European observers, obsessed with the Lugard theory that ‘conceptions of land tenure are subject to a steady evolution, side by side with the evolution of social progress, assumed that African land ownership was vested originally in the tribe but, under the influence of European rule, gradually evolved towards individual tenure. In Kikuyu custom the opposite process was the rule: originally the founder of a mbari (clan) acquired what was in many respects an individual title to a githaka (holding); on his death a communal form of tenure was created...Originally the ownership of the land and the authority over it was vested in the founder.”²

4.3 But Lugard appeared to envisage the vesting of the land in the head of the family before “the tribal stage is reached”, and indeed, whatever may have been the origin of the Kikuyu mbari (clan), it cannot be seriously contested that, during the first half of the twentieth century, more and more rights were being acquired and exercised by individuals in what at that stage was unquestionably clan land, with well-defined boundaries between clans. Land dealing was developing apace in some areas, and redeemable sale, for instance, became a fruitful source of uncertainty. Kikuyuland in fact offered an outstanding example of an area where the vagaries of customary tenure impeded agricultural progress and where ‘natural evolution’ was clearly inadequate to keep abreast of modern requirements.

5 Registration of title as a remedy for the shortcomings of customary tenure

5.1 It is, indeed, questionable whether in conditions of swift economic advance, customary land tenure is by itself capable of satisfactory evolution. Evolution is a process of development from earlier forms, as opposed to a new creation. Given time, all societies would develop or adapt older institutions to cope with new situations. But the pace of political, social and economic change in the modern world has been so rapid that

¹ Lugard Dual Mandate 280; quoted in: *Journal of African Administration* (April 1954) 50; *Report of the Arusha Conference* (1956); Lawrance Mission Report (1966) 5 para 14

² Sorrenson *Land Reform in the Kikuyu Country* 9

there simply has not been time for evolution. In such circumstances it may prove necessary to replace customary law rather than wait for it to evolve.

5.2 Such action, however, is by no means always acceptable, for there is often an almost mystical belief in the virtues of customary land law and in its ability in all circumstances to meet modern needs. This belief may to some extent be a relic of the colonial era when familiar customary law was regarded as a welcome buffer against strange and sometimes restrictive alien legislation, but there still remain some solid reasons why it survives. The tenorial structure is woven into the very fabric of tribal society, and tribal society (and its land tenure) can by no means yet be treated as obsolete, or even obsolescent. Moreover, so long as sufficient land in fact remains available, the customary system provides a form of social insurance (where none other exists), for no member of the social group will find himself without land when he needs it on his return after long absence or in his old age. It is scarcely surprising therefore that often there is reluctance to recognize that individual ownership is ousting, or in some places has already ousted, the corporate or 'customary' approach to land tenure.

5.3 It is at this point that procedure, in the form of adjudication and registration of title, becomes confused with policy – and, moreover, highly sensitive and controversial policy. 'Individual enterprise versus nationalization' is just one of the many labels that can be given to what is always a very fierce ideological and political issue, not least when it comes to land tenure. Some will hold that the formal recognition of the individualization of tenure – let alone its official encouragement – is a sin against society; others will urge that it is essential to economic growth. Both sides may argue that registration of title so facilitates and encourages individualization that it becomes a policy in itself instead of being merely the instrument by which policy is effected.

5.4 Indeed, in some countries the process of registering land in customary tenure is referred to as 'tenure conversion' as though it is the adjudication and registration which actually change community tenure to individual tenure. To use adjudication for this purpose conflicts with the basic principle that it only recognizes existing rights. Strictly speaking registration is a device to give certainty to the ownership of land and to enable dealings to be conducted quickly and cheaply; it is not intended to change tenure but only to ascertain and give form to existing tenure so that current practices can more readily be regulated and organized. Nevertheless, as we explained in Chapter 11, in recent years registration has clearly been used in some countries (Kenya, for example) to effect a policy decision to hasten individualization, and indeed in some areas to induce it where it did not exist.¹ Where adjudication brings about a change which has not yet occurred naturally, it can scarcely be described as 'recognizing an existing interest' and perhaps 'conversion' is then nearer the mark. In any case, however, even where adjudication merely recognizes individualization which appears to be virtually complete, registration finally extinguishes the customary character of all rights in land and to that extent 'converts' customary to statutory tenure, even though the change in the incidents of the tenure itself has already occurred.

¹ See 11.8.9

5.5 As we have just pointed out, individualization of tenure is a process which takes place spontaneously in areas where there is economic development or where pressure on land makes it no longer as freely available as air and water, a 'free good' as the economists say. Naturally the traditionalist will view the passing of customary tenure with regret, if not with suspicion and resentment, or even perhaps with a refusal to admit the change. As one African district commissioner graphically expressed it: "Custom is one thing, what people do is another." But there is evident danger in this situation. Agriculture is developing new methods, and population is increasing so fast that there will soon be few areas where customary land tenure can be left to take its course. It must not be allowed to become a sacred cow, to be preserved alive at all costs after its usefulness has passed. Societies throughout the world are at some time or other confronted with new situations which sooner or later demand regulating legislation to replace whatever usages they have outgrown. Nowhere is regulating legislation more necessary than where processes of land transfer are developing, not according to custom but in spite of it.

5.6 There is, in fact, in many countries urgent need for action in respect of land used under customary tenure which is impeding development, particularly where individualization is already well advanced. The problem in these areas is how to find "a form of title which will, on the one hand, preserve the residual rights of the community in its lands and on the other, provide the holder with the necessary economic incentive to the best use of the land."¹ In other words it is necessary to resolve the uncertainty of customary tenure in order to provide the individual with the security of tenure essential for any long-term development, while at the same time making possible the exercise of administrative controls, which may be desirable but are out of the question so long as the nature and extent of the existing rights in the area remain undetermined.

5.7 The introduction of registration of title (together with some simple substantive law) is undoubtedly the best method of achieving this end. A suitable law can make quite certain who (individually or corporately) 'owns' any given piece of land, and how the owner may deal with it. Equally important it makes quite clear who may not deal with it, thus no longer leaving this unpleasant fact to be discovered by some unfortunate purchaser after a long and expensive lawsuit (in which, maybe, the judge is making new law). It also deals just as effectively with the various subordinate or derivative interests. We set out and discuss an example of such a law in Book 2, in which we also describe the origin and development of the Kenya Registered Land Act 1963 and the Lagos Registered Land Act 1965.²

¹ Lord Hailey 'The Land Tenure Problem in Africa' *Journal of African Administration* Special Supplement (October 1952) 7

² It is perhaps not without significance that in Allott's *New Essays in African Law* (London 1970) the Lagos Registered Land Act 1965 receives mention only as a name at the end of a list in a footnote, since the effective implementation of such an Act would make his chapter 'Fee Simples in West Africa' as otiose as, in common sense, the fee simples themselves have always been, though the subject of many a long and learned judgment. The Kenya Registered Land Act 1963, and its predecessor the Land Registration (Special Areas) Ordinance 1959, are nowhere named, let alone debated, in the *New Essays*,

5.8 A particularly impressive example of this system is to be found in West Malaysia. In 1891 Sir William Maxwell, who as Commissioner of Lands in the Straits Settlements had visited Australia in 1883 and written a penetrating report on the Torrens system,¹ introduced two forms of title registration, one for 'European' lands and the other for lands held under customary tenure; the latter was little more than the recording of occupation (with the quit-rent payable) by the Collector, with a record office in each parish. The right conferred by such recording, although transferable and transmissible, was merely a right to the occupation of the land and could not be leased or charged. Transfer required no more formality than the alteration of the name in the Collector's record. The *Mukim* Register, as this record was called, was introduced in 1897 and from that date the tenure of these lands has tended to assimilate to that of the European lands (where the system introduced was free of the complexities of English land law). Today there is no essential difference between the two, and a person registered in the *Mukim* Register can charge or otherwise deal with his land as he wishes. All sections of the community are familiar with the process and there is now no need for special safeguards. As we pointed out in the last chapter, West Malaysia enjoys the simple law and conveyancing procedure that Torrens had in mind for Australia, where in the event English land law has survived in spite of his efforts.

5.9 We need not repeat the arguments for registration of title as a system or for the process of systematic adjudication which we described in Chapter 11, where we also examined and dismissed the arguments in favour of sporadic adjudication, strong though they appear to be at first sight.² We must, however, once again stress the need for selective application. Adjudication is an expensive and involved operation; it should only be undertaken when the likely economic or social benefits are sufficient to justify the trouble and cost. In countries where, as in many parts of Africa, gross inequalities of population density and development result from natural factors such as inadequate rainfall or the presence of tsetse-fly, it is inconceivable that there can be justification for registering title throughout the whole country in the foreseeable future. This point requires emphasis. For example, it appears to have been overlooked in Kenya, as the Lawrance Mission remarked:

“it seems to be presumed, almost universally, that registration of title...will itself automatically produce good development and indeed is essential to it...We do not wish to decry registration of title as a useful, indeed necessary process, but we must get it into the right perspective. It is not a panacea for all tenurial ills, not indeed is it, as so many seem to think, an end in itself. We feel we must make this clear because, in making it an aim of policy to apply registration of title unselectively to all areas

though these laws have unquestionably had a profound effect on customary land law in Kenya. Nor does the Land Settlement and Registration Ordinance 1925 in the Sudan receive a mention, despite its far-reaching importance. Indeed registration does not, in any form, even find a place in the index. This lacuna is alarming in a work of such authority, not least because on the cover it is claimed that this collection of essays 'discusses in particular statutory law'.

¹ *The Torrens System of Conveyancing by Registration of Title* (1883)

² See 11.9

capable of development throughout the whole country, the Kenya Government is not only attempting a task of unparalleled magnitude but could in many places be merely handing a stone to the man who is asking for bread.”¹

For some time there will remain areas where customary tenure continues to be adequate and it would be unwise to disturb it, as we emphasized in Chapter 1.²

5.10 The selection of appropriate areas for systematic adjudication and the decision on when to introduce it must be matters of judgment by government in each case. In Chapter 15 we describe in detail the procedure of systematic adjudication and set out the criteria which should determine the choice of areas.³ Those criteria which specially concern areas of customary tenure mostly relate in some way to the uncertainties of customary land law in the face of rapid economic or social change, and in the next paragraph we have italicized certain factors that should be particularly considered when deciding if and where action is needed.

5.11 The insecurity of tenure which results from the uncertainty of customary land law is often a major obstacle to development. Without security of tenure there is no incentive to develop or improve agricultural techniques; there may even be a positive disincentive as, for example in Lesotho (formerly Basutoland) where, if a cultivator improves the productivity of his land, he may find that his land allotment is then reduced. The cultivation of valuable cash crops, which require greater inputs of capital and labour than subsistence crops, is especially vulnerable, for it cannot be reconciled with the traditional periodic reallocation of land which is a feature of some customary tenures – in Ethiopia, for example, as revealed by land tenure surveys made there by the Ministry of Land Reform. Where there is free enterprise the development of a market in land is desirable for economic reasons,⁴ particularly where growth of population results in competition for land. The fact that sales or leases of land can still be regarded as contrary to customary land law creates uncertainty and restricts the market. A high incidence of land litigation is a fairly reliable indication of the uncertainties of customary land law. This is one factor that it is sometimes possible to quantify. For example, in one district of Kenya in 1964 land litigation cost more than £25,000 and wasted more than 32,000 man-days. (In the same year no land cases were recorded in the Central Province where all the land had been registered.)⁵ The uncertain arrangements of customary land law impede the extension of agricultural credit, for although official agencies may exist which will advance loans on the security of the farmer’s character or on his chattels, commercial banks will almost invariably insist on land as a security and this can be provided only by registered title.

5.12 That registration is desirable is not the only factor which governs the selection of areas; its introduction must also be practicable. At a conference held in 1956 at Arusha in

¹ *Lawrance Mission Report* (1966) 9 para 31

² See 1.5.4

³ See 15.3

⁴ See 1.6.1

⁵ See *Lawrance Mission Report* (1966) 20 para 71 and n

Tanganyika (where the whole subject was canvassed in great detail) it was emphasized that registration should not be undertaken unless

(a) it has a reasonable measure of support and is not opposed by any substantial proportion of the persons whose land will form the subject of the record;

(b) the requisite staff and organizational ability with which to set up, and operate continuously, the working records of the system are available;

(c) adequate survey facilities are available to carry out cadastral work of the required degree of accuracy;

(d) the expense and complexity of the operation embarked upon are fully appreciated; and

(e) the areas of land within which adjudication and registration are to be initiated are recognizable and definable.¹

6 Some problems in registering customary land

6.1 The registration of customary land involves certain policy issues. We have described how in most customary tenures the land is owned by a group (or by overlapping groups) while various rights are exercised by individual members of the group. On adjudication the problem is to determine how ownership and rights are divided between the individual, the group and the state. The principles upon which this problem is to be resolved must be decided, and we will consider three particular aspects of the matter which have caused doubt or difficulty: (1) the registration of unused land; (2) the policy respecting family or group ownership; and (3) the registration of land as 'customary land'.

(1) UNUSED LAND

6.2 Who is to be recorded as the owner of land in respect of which there is no valid private claim, i.e. who has the right to dispose of it?² (It should not, of course, be assumed that land registered as state or government or public land will be disposed of.) In the Sudan "all waste, forest and unoccupied land shall be deemed to be the property of the Government until the contrary is proved",³ and the demarcation officer is expressly charged with the duty of demarcating such land on behalf of the Government.⁴ In Sri Lanka (formerly Ceylon), the Land Settlement Ordinance 1931 is used primarily for the purpose of ascertaining what land is free of private rights and so at the disposition of Government. On the other hand there are countries, such as the southern states of Nigeria, where the presumption is that all land is locally owned even if it is virgin forest

¹ *Report of the Arusha Conference* (1956) 8 para 35

² See *Sonius Customary Land Law in Africa* 29

³ Land Settlement and Registration Ordinance 1925 sI 6(c). (The Unregistered Land Act 1970 s4 provides that all unregistered land is the property of the Government and shall be deemed to have been registered as such. Nevertheless, the process of adjudication still proceeds despite this revolutionary innovation.)

⁴ See 15.6.1(2)

or swamp, and before Government can dispose of any land, it must first acquire it from the local people.

6.3 It is evident, therefore, that here is an important question to which there is no ready-made answer and policy must be decided before a process of systematic adjudication is set in train in any particular area. Indeed, the principle should be determined before the requisite legislation is drafted, though in Malawi the issue has been avoided by enabling land to be recorded as “unallocated garden land”,¹ so that customary methods of allocating it continue undefined and unregulated (i.e. although registered it continues to be land under customary tenure and so falls under the third heading we are now considering).

(2) GROUP OWNERSHIP

6.4 There is a widespread misconception that registration of title inevitably connotes the individualization of ownership, or at least that registration is inconsistent with family or ‘group’ ownership. In Nigeria, for example, it was expressly provided in the Registration of Titles Ordinance 1935 that, if any person opposing an application for first registration proved to the Registrar that the land claimed was family land under native law and custom, the Registrar should dismiss the application unless the consent of the family could be obtained to the registration of the claimant. There was no provision to enable the family as such to be registered.²

6.5 Yet in Nigeria there is no doubt that a family can own land though originally, under strict customary law, it could not dispose of it. This restriction has been gradually modified, but the question of who can actually deal on behalf of the family has caused much confusion and litigation of the sort which adjudication and registration of title can so effectively avoid if there is no rigid insistence on complete individualization.

6.6 Provision to enable family land to be registered was made in the Registered Land Act which was enacted in 1965 for the then Federal Territory of Lagos, and it is worth describing in some detail how that Act treats this important matter. It provides a process for the appointment of what are called “family representatives”³ who may deal with the land. They are in no way relieved from their duties and responsibilities to the family, but a bona fide purchaser for value can deal with them as proprietors, secure in the knowledge that the transaction cannot be upset merely on the grounds that they have not done their duty as family representatives. This does not affect the right of individual members of the family to proceed against the family representatives and obtain damages if they have done wrong, but the land itself cannot be recovered if it has been sold to a bona fide purchaser.⁴ However, before a disposition of family land can be registered, the representatives are required to sign a statutory declaration that they have consulted the

¹ Customary Land (Development) Act 1967 s20

² Registration of Titles Ordinance 1935 s10(1)

³ ss12 and 124

⁴ s126

family and that the majority of its members are in favour of the disposition.¹ This provision should effectively safeguard the interests of the family, though it has not yet been tried in practice.

6.7 If for any reason the family representatives cannot be ascertained, the land is merely recorded as family land and there can be no registered dealing in it, though it can continue to be occupied and used in accordance with custom.² The Nigerian Act also enables all the members of a family, if they are not too numerous, to be registered as proprietors in common,³ or they can opt to partition the land so that each member will have his share.⁴ Provision is thus made for every contingency. There is no compulsion to make any particular choice, but what the family does choose is recorded with certainty. There is no longer a danger of merely 'buying a lawsuit' when buying family land, as it was said used to happen. These provisions could be a suitable model for the registration of group ownership in other parts of the world. It should be specially noted that they do not attempt to alter the tenure. Their sole purpose is to confer certainty and, if dealing is desired, to make it simple, cheap and, above all, safe.

6.8 In Kenya, however, the strict principles of adjudication were not adhered to in the legislation of 1959, and no form of group ownership was allowed. For nearly ten years registration was literally synonymous with individualization and it was not until 1968 that a new Land Adjudication Act made provision to enable a 'group' to be registered, defining a 'group' as "a tribe, clan, section, family or other group of persons, whose land under recognized customary law belongs communally to the persons who are for the time being members of the group".⁵ Apart from any other consideration it was desirable from the economic standpoint in some areas that a family or group should be put on the register in order to avoid the subdivision into uneconomic holdings which would result from insistence on individualization, though the reason given for the change was merely that, in ranching areas, group ownership is obviously to be preferred to any subdivision into holdings too small for ranch development.

(3) CUSTOMARY LAND ON THE REGISTER

6.9 The registration of customary land as customary land would appear to be a contradiction in terms if the essence of custom (and so of customary tenure) is that it should be unwritten. Yet when an area of customary land is systematically adjudicated there are likely to be parts of it in which custom will continue to control use. Examples are burial grounds, sacred groves, and the like, which will appear on the map and therefore should be 'adjudicated'. Provision should therefore be made for such land to be shown on the register as 'customary land' used for whatever the particular purpose may

¹ s56

² s12(4)

³ s11(3)(a)

⁴ s103

⁵ s2

be (though specific provision for this is not to be found until it was made in the Malawi legislation of 1967, an innovation which resolved this particular difficulty).¹

6.10 There may also be pockets of land, where registration of title would be anomalous so far as their internal arrangements are concerned. A simple example will illustrate the point. When the Gezira in the Sudan was adjudicated, the purpose was to ascertain the rights in agricultural land. There were, however, many villages in the area and, though it would have been possible to have ascertained individual rights to land in these villages, it would clearly have served no useful purpose. The limits of each village were therefore demarcated and the parcel thus enclosed, duly shown and numbered on the registry map, was merely recorded as the haram (precincts) of such-and-such a village. Later if needs be – perhaps because the village was growing into a market town requiring planned development – the individual rights in it could be adjudicated. (At the same time, it might also be necessary to take in adjacent agricultural land for village expansion.)

6.11 A similar process can be applied to land within a declared adjudication area which is in customary occupation and which, for some reason, it is found undesirable to ‘individualize’. If it can be demarcated on the ground and given a number on the map, it is unnecessary formally to withdraw it from the adjudication declaration. It can be recorded on the register as ‘customary land’ and adjudicated in detail when that proves to be necessary. It is even possible to ascertain and record ‘representatives’ who may then deal with the land like the family representatives already described; this is a useful device where, for example, Government wishes to acquire land for some public purpose, and must know with whom it can deal with certainty and safety.

7 Some possible or alleged disadvantages of registering customary land

7.1 We must now consider some of the arguments against the introduction of registration of title into areas of customary tenure. In Chapter 9 we examined obstacles and objections to its general adoption, but the following points are of particular significance when customary tenure is concerned.

7.2 A genuine danger is that it may perpetuate an unsatisfactory pattern of land ownership. For instance, where it is clear that farms are excessively fragmented, or that holdings should be reorganized to make use of irrigation facilities, or that cash crops can be satisfactorily produced only by mechanical cultivation under expert supervision on land pooled under common management, it is patently unwise to register the existing proprietary pattern before arrangements have been made to effect the necessary reorganization. Admittedly the East Africa Royal Commission argued that registration of fragments, by making them easily negotiable, would facilitate voluntary consolidation, but this argument was rejected by the Arusha Conference and the FAO Centre on Land Tenure Policy in East and Central Africa, and subsequent experience in Kenya and Uganda certainly does not support it. Indeed, if there is already an unsatisfactory pattern of landholding there is always the danger that registration of title may perpetuate it

¹ Customary Land (Development) Act 1967 s20

unless any adjustments necessary can be made at the time of registration to ensure that the lay-out is suited to the type of development required in the locality. In Chapter 8 we have already emphasized how the cost and trouble of effecting 'mutations' through registry procedure may inhibit change which otherwise might take place informally.¹

7.3 It may be feared that registration of title will lead to chronic indebtedness, Provision of a secure title which can be pledged for a loan may result in a landowner losing his land if the loan is used for unproductive purposes or, if the rate of interest is exorbitant, he may at least lose the incentive and the means to farm properly. Rural indebtedness on a wide scale was experienced in India and Burma against a background of land record which led to the emergence of individual title, but fortunately this problem has not yet arisen in most of Africa, though it did in Zanzibar where it occurred without registration of title to facilitate it. Indeed, so far from encouraging debt, registration of title may be the most effective means of controlling it, as we explain in the next section of this chapter.

7.4 We have described how it is a basic principle of many systems of customary land law that, through membership of his community, any person can get land for his use. With natural increases of population it is obvious that whether or not registration is introduced, this principle will eventually be impossible to conserve and that automatic entitlement to land will cease. Nevertheless, it is also obvious that registration of title must hasten this process of change, for individuals or families with an exclusive title to land will not normally be prepared to make part of their land available to persons other than close relatives. It might, however, be argued that this effect of registration should be classified as an advantage rather than a disadvantage or danger, for it may act as a brake on excessive subdivision of land or the breaking up of farms into a number of separate fragments. It is a disadvantage only in the sense that some members of society will the sooner be deprived of a right which under customary land law they might expect to exercise for some time to come.

7.5 We have stated that registration does not by itself change customary land tenure; it merely records it and makes it certain. Nevertheless, it must be admitted that the recording of warranted titles in the name of individuals or families must to some extent result in a loss of community influence, for no longer will the community, through chiefs or lineage heads, exercise control over dispositions of land, either to members of the community or to strangers. But loss of community influence is not always a disadvantage. For example, community influence often tends to restrict the negotiability of land, whereas one of the principal aims of registration is to increase it. Certainly the breakdown of tribal exclusiveness, which may deny land to those who can use it best, is desirable on economic, social and even political grounds. Nevertheless, loss of community influence will certainly adversely affect the status of some people, such as the clan heads whose powers of allocation or disposal of land will diminish or disappear. However, their influence may be retained, for so long as it is desirable, through the medium of control legislation, which we must now explain.

¹ See 8.10.7

8 Control of land dealing

8.1 Freedom of disposition is regarded as an essential attribute of ownership; indeed, one of the principal merits claimed for registration of title is that it makes dealing simple, cheap and certain, and thus promotes ‘mobility’ in land transfer. Yet, paradoxically, this freedom must be withheld, or at least severely restricted, when individual title is first officially recognized among unsophisticated people, if they are not to lose their lands. Too often has it been shown that there is no more certain way of depriving a peasant of his land than to give him a secure title and make it as readily negotiable as a bank-note. We must take into account what happened in India, Burma and other lands where no control was exercised when individual ownership was first introduced amongst the indigenous people. There is warning enough from the United States where the General Allotment (“Dawes”) Act of 1887 set in motion a well-meant but unfortunate plan to stimulate individual landholding amongst Indians. Portions of reservations were designated allotment land and each Indian, on a compulsory basis, received an allotted share, which he was not allowed to sell for twenty-five years. Tribal land not allotted became surplus, available in due course for lease or sale to the Government or to non-Indians. As things worked out, land in Indian ownership, individual or tribal, declined from 138 million acres in 1887 to 48 million acres in 1934.

8.2 There can really be no doubt, therefore, that it is essential to make provision for control when land dealing begins to develop in areas of customary tenure, and especially of course if land registration (which alone makes control possible)¹ is introduced to facilitate that dealing.

8.3 New Zealand offers a most instructive example in this regard. By the Treaty of Waitangi in 1840 the Maori chiefs were guaranteed their rights in land in return for acknowledging their submission to the British Crown. The protection of these rights was first entrusted to an officer called the Protector of Aborigines, but in 1862 the Native Lands Act set up the Native Land Court which to this day remains the custodian of Maori interests. The first duty of this court was to enquire into and establish the titles to customary lands.

8.4 All land in New Zealand now falls into one of the following categories:

- (1) Crown land which is land other than European land and Maori land.
- (2) European land which is land alienated by the Crown for ‘an estate in fee simple’ and includes Maori land which has been converted to this category (whether actually held by a European or a Maori).
- (3) Maori land which is either
 - (a) customary land still held by Maoris under Maori custom, or
 - (b) Maori freehold land which is Maori-owned land obtained from customary land by order of the Land Court after investigation of the title (but it does not include European land owned by a Maori).

¹ See 9.5.5

8.5 No alienation of Maori land by a Maori is allowed without the consent of the Land Court, which has to be satisfied

- (a) that the instrument has been executed in the manner required by the Act;
- (b) that the alienation is not contrary to equity or good faith, or to the interest of the Maori alienating;
- (c) that the alienation, if completed, would not result in an undue aggregation of farm land;
- (d) that, having regard to the relationship of the parties and to any other special circumstances of the case, the consideration for the alienation is adequate;
- (e) that in the case of any alienation by way of sale the purchase money has been paid or has been sufficiently secured;
- (f) that the alienation is not a breach of any trust to which the land is subject;
- (g) that the alienation is not otherwise prohibited by law.

8.6 It is the policy of the Government that the evolution of land tenure should keep pace with the education of the people, so the Board of Maori Affairs (set up under the Maori Affairs Act 1953) will carry on its function of teaching the Maoris the best methods of improving their land and marketing its products, and the Maori Land Court will exercise its quasi-parental jurisdiction until such time as all Maori lands have become Europeanized, and thus subject to English law.¹ It is perhaps unfortunate that, with the completion of registration of title throughout New Zealand, the opportunity was not taken to simplify English land law and get rid of archaic survivals from feudal law which have never been relevant there.

8.7 Some Governments in Africa took precautions early in the twentieth century to safeguard indigenous land rights. In the Sudan, for example, it was provided in 1905 that native land could not be sold without the approval of the administrative authorities. Since the purpose was to protect owners unaccustomed to land dealing, this approval was required whatever might be the nationality of the purchaser. In Uganda, however, a similar provision was confined to transfers to non-natives. The Land Transfer Ordinance of 1906 imposed the obligation to obtain official consent before any right or interest “in any land occupied or held by any native of the Protectorate may be transferred in any manner to any person not a native of the Protectorate”. Except for a partial relaxation of control over mortgages and a special dispensation for certain annual tenancies, this consent is still necessary under the Land Transfer Act 1944 which is the main instrument of Uganda Government policy for the prevention of alienation of land rights to persons who are not citizens of Uganda.²

8.8 In colonial territories generally, however, much of the necessary ‘regulation’ was effected merely by regarding the land as ‘customary land’, for it was held in many places that land in customary occupation could not be sold or otherwise disposed of. Thus customary land, as long as it remained customary, was automatically protected. But policy and practice were by no means uniform. In some areas, for example in West

¹ See D & S 170

² See West Land Policy in Buganda 133

Africa, a process for selling 'customary land' – even to aliens – has developed and is recognized by case law. But the process has developed slowly enough for people to become accustomed to it, and special safeguards do not appear to be necessary, though perhaps they might be needed if registration of title were introduced into an unsophisticated area and suddenly made dealing very easy for persons quite unfamiliar with it.

8.9 In Kenya, as we have described in Chapter 11, registration of title has been introduced on a large scale, sometimes in areas where the people were by no means yet accustomed to dealing.¹ Some control was essential and the Land Control (Native Lands) Ordinance was enacted in 1959 at the same time as the Native Lands Registration Ordinance. The Land Control Ordinance enabled a provincial commissioner to divide his province into divisions and a land control board under the chairmanship of a district officer was set up in each division. Any dealing required the consent of the board which comprised two officials (usually the agricultural officer was included, but veterinary or other considerations might be of importance in the area and so another technical officer might be appointed), two persons appointed by the District Council, and not less than six or more than fifteen persons locally elected. This allowed the traditional 'guardians of the land' (i.e. those responsible for its allocation under customary law) to be associated with the new procedure, thus helping to bridge the change from customary control to complete individual emancipation. Provision was made for appeal. This process was continued, with some necessary procedural changes, after independent government was established, and provision is now made for it in the Land Control Act 1967.

8.10 Similar legislation was enacted in Malawi in the Local Land Boards Act 1967 passed at the same time as the Registered Land Act 1967 (which introduced registration of title) and the Customary Land (Development) Act 1967 (which made provision for the adjudication of land in customary tenure). In addition to controlling land dealing the Malawi Local Land Boards are charged with the duty, when application is made, of partitioning 'family land' (which can be registered as such in Malawi).

8.11 Control of land dealing is needed for two purposes. The first is to protect (at least in the early days of title) the unsophisticated landowner against those who are not only more astute but are also in a much stronger bargaining position economically. The need for this protection will pass; indeed some countries regard such paternalistic legislation as unnecessary. For instance, registered title has been introduced into the customary areas in the British Solomon Islands Protectorate without any such protection. The administrative authorities, after due consideration, did not think it necessary at this stage.

8.12 The second purpose of control is to protect the land from dealing which may adversely affect its use. In the next chapter we shall explain how this control machinery can be used to prevent fragmentation, at least so far as the registered title is concerned.

¹ See 11.8.9