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The System of Land Rights in Nigerian Agriculture

By DON N. IKE*

ABSTRACT. *Land ownership* in the *agricultural sector* of the *Nigerian economy* is basically communal. Under this system the *land holding* group is the family, clan, village or community. An important practice under communal ownership is the principle of *inalienability of land*. The mobility of the agricultural labor force is inhibited. Non-provincials are forbidden to plant cash crops. *Property rights* to land are not specific. Individualized allotments are absent and land markets non-existent. Other details of the *communal system* of *land tenure* in Nigeria are given. Reasons are sought for the persistence of custom in the practice of inalienability of land even when economic conditions have changed, enabling the right perception of *land values*.

Introduction

UNDER INDIVIDUAL TENURE RIGHTS, ownership of land implies: (1) the right to use the land parcel throughout life (including the right to exclude others from its use); (2) the right to transfer the above rights to someone else, including transfer by sale.[1] Thus it involves exclusivity of use and the right of transfer by sale or rental.[2]

On the other hand, under a communal system, as practiced in Nigeria, the landholding group is the family, clan, village or community.[3] The legal position of a member is that of entitlement to a block of land for cultivation. A member is one of the "many dead, the few living and countless others unborn,"[4] who in customary law are the owners of the land. Members have co-ownership only in the sense that they have common rights to possess and use parts of the land. Although the right of use has been confined to adult members, in customary law, the children of those members have the same rights, the exercise of which is temporarily postponed.

Alienation of land in Nigeria must be done only with the consent of the principal members of the family or community concerned. In a survey

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conducted by R. O. Adegboye,[5] taking samples over eight villages comprising five language groups (Ibo, Efik, Edo, Urhobo, Yoruba), the respondents (a total of 270 farmers) stated that: (1) land for agricultural use is acquired mainly by inheritance within the family, and (2) sale of land is rarely approved and must have the consent of every member of the landholding group.

Among the respondents, 86 percent derived their ownership by inheritance within the family, and 10 percent by sale. Four percent had rented the land they used.

A problem still arises with respect to division of a deceased's land. According to Adegboye, it is still a matter of varying opinion whether to share the deceased's land equally among the male heirs, or to appoint the eldest son to run the descendants' estate on behalf of the family, using family labor resources. However, the most prevalent mode of distribution of inherited land was the practice of dividing the land *per stirpes, i.e.* into the number of wives the deceased left behind. This practice is being modified to mean the division of the land into the number of the wives who bore male children for the deceased while still actively married to him.[6]

While 56 percent of the respondents have heard of the practice of alienating land by sale, only 10 percent supported it. With respect to land, the word sale is often dreaded by rural inhabitants, those indulging in it being likened to traitors and betrayers of public trust. When a farmer related a story of how he had to "sell" his land because of pecuniary difficulties, what he meant by "sale" was pledge, for as soon as he got enough money, he proceeded to redeem his land. The principal characteristic of pledge is its ultimate redeemability, even if it takes a future generation to do this.

The role of the chief is that of a trustee of the land for the community and he is also a facilitator of transactions in land. The chiefs do not give away any rights to the land of permanent usufructurary character, since it would contravene the Roman principle "*nemo dat quod non habet*"[7] which is also a guiding principle in the customary law that regulates transactions in land. As stated in *Amodu Tijani v. Secretary Southern Nigeria,* "the chief is only an agent through which the transaction is to take place, and he is to be dealt with as representing not only his own interests but other interests as well."[8]

II

The Past and the History of Communal Tenure

HISTORICALLY, LAND has been held under communal tenure in Nigeria not unlike most of Africa. According to Elias, there has been a gradual attenuation

of the forces of tradition in the land tenure system principally due to the encroaching impact of English ideas of property rights and the economic forces represented by the growth of the market system and the increasing pressure of the population. As a result, today many people own some lands on their own rights, but communal tenure is still the predominant form [9]

The fundamental law of communal tenure is the inalienability of land. The practice of alienation of land was not known in Nigeria prior to 1852 when a treaty signed in Lagos abolished the slave trade and led to an influx of ex-slaves to Lagos from Sierra Leone. Said Chief Justice Osborne, after referring to this event, "the practice of alienation of land sprung into vogue and another new feature totally foreign to native law which knew not writing was introduced in the shape of written grants by the King of Lagos."[10]

In other parts of Nigeria, efforts had been made to stop the encroaching "vices" of trading in land since, if left unchecked, it would destroy the communal system. In Abeokuta, for instance, land was being increasingly bought and sold until 1913, when an Order-in-Council was enacted by the Native Administration to put an end to "this abuse". This order forbade alienation of land to non-natives.[11]

In Ijebu Ode District, sale of land was a rare practice in 1912, although in that year the District Council passed laws forbidding alienation to non-Ijebus.[12] If a sale was effected among the Ijebus, it had to be confirmed by the Awujale (Paramount Chief) who placed on the land an "Orisha-oke", a symbol of the Yoruba-deity or patron of agriculture. This practice was still in use in 1951, according to C. W. Rowling.

Among the Ibo of Eastern Nigeria, sale of land is, in general, contrary to native law and custom, though land could be transferred in the way of a gift or as compensation for homicide. Writing of the Umueke-Agbaja area, Miss M. M. Green stated that "sale of land as distinct from pledging and leasing is unequivocally forbidden by native law and custom."[14] Some transactions via sale, however, did take place and these have been increasingly brought under control by local ordinances. In Bende Division, as early as the 1930s, many village groups forbade all sales of land where it became evident that the village land was not sufficient for the subsistence need of the people.[15]

In Northern Nigeria, the lands committee of 1908 had reported that all lands were the property of the community and as such no private estate existed. On the basis of this report, all lands in the Northern provinces were subsequently declared to be held in trust for the people by the Governor. Their disposition was placed under the Governor's control. No title to the use or transfer of land was valid without the Governor's approval, and

alienation of land to non-natives was expressly forbidden although temporary rights of occupancy could be granted by the Governor to these aliens.[16]

III

Modes of Transfer of Communal Lands

SINCE ALIENATION OF LAND by sale has no sanction in customary law, different means of alienating or transferring land are used principally to protect the communality of ownership. These modes of transfer are inheritance, gifts of land, pledge, borrowing of land and leases. These are not perfect substitutes to sale since they have different allocative effects as will be seen below.

Lineage and village lands being held collectively cannot be inherited by individuals, but self-acquired property including land is inheritable. If a member of a lineage group has been assigned a lineage land for cultivation, then those crops are inheritable by his immediate heirs and not by the immediate group which hold title to the land. Where the land is used for subsistence (food) crops, the allotee's immediate heirs could continue growing some food but after the period of fallow, the land reverts to the community for re-allocation.[17]

In Western Nigeria, the eldest son of the family or group inherits the headship of the family or group. Division of family property, including land, is into equal shares between the respective branches, account being taken of any property already received by any of the founder's children during his lifetime.[18]

In the Eastern Provinces, among the Ibos, personal property descended to the eldest son as heir, or failing a son, to the eldest brother or male relative.[19] A form of proportionate division *per-stirpes* is reported by Miss Green among the Umueke-Agbaja in the same provinces. There the largest share goes to the deceased man's eldest son by whichever wife as "diopara." The next biggest share goes to whichever son, by a different mother, is next in age and so on until the eldest son of each wife has had a share. The second sons come in the second round, again beginning from the house to which the "diopara" belongs. This goes on into several rounds until all sons have a share, the shares progressively becoming small in size all the time.[20]

Women do not inherit land, partly because by customary law, women are not expected to remain unmarried. Thus Ajisafe said of the Yorubas, "there is no spinster in the country, every woman being married."[21] Dr. Baseden made a similar observation about the Ibos, "the Ibo woman shrinks from the prospects of being husbandless. She knows too well the disgrace that is attached to that unfortunate condition."[22]

The principle of primogeniture is not sanctioned by the Maliki Code, which requires equality of distribution of a deceased's estate among his children. This law governs the inheritance rights on land among the Moslems who are in the majority in the Northern states of Nigeria. This has occasioned fragmentation of holdings and efforts have been made to set a minimum limit to the extent of permitted subdivision of agricultural lands.[23]

Meek has listed some of the actions that are recognized as superceding the customary law governing inheritance.[24] One such act is a gift from a donor to a donee which precludes the donor's son from inheriting the land on the death of the donor. The others are written wills, and marriage under Christian rites.

Family or village lands cannot be given away by members thereof individually. But lands acquired by an individual could be disposed of as he pleases.

Gifts of land involve a transfer from a grantor to a grantee who subsequently enjoys perpetuity of tenure, subject to good behavior. This is a common practice in Nigeria, in all parts. Gifts of land are of two forms, revocable and irrevocable. The normal form of a gift is revocable, because the donor may revoke it at any time, but until this is done, the donee can alienate the land and if he does so, the donor is completely expropriated. If the gift is irrevocable, the donor completely loses his interest at the time of the gift. A revocable gift can be converted into an irrevocable one by the death of the donor.

The consent of the family is required to validate a gift whether it be to a member of the same family or to a stranger. In *Osbodi vs. Aremu,* the gift of the family land by the head of the Oloto family to a member of the family, without the consent of the other members of the family, was held to be invalid.[26]

A person in need of money can pledge whatever he has under customary law. In the past, human beings were also pledged. According to Elias, "pledge is a kind of indigenous mortgage by which the owner occupier of land, in order to secure an advance of money or money's worth gives possession and use of land to a pledge-creditor until the debt is fully discharged."[27] Pledging of land is more common in Southern Nigeria.

Onwuamaegbu has listed the main principles of the pledge.[28] Food bearing trees can be pledged independently of the land or could be reserved to the pledgor; the pledgee then plants only food or subsistence crops. No permanent buildings could be erected by the pledgee since this could lead to a claim of sale by the pledgee. The principal characteristic of pledge, however, is its ultimate redeemability.[29]

Family or communal land cannot be pledged without the consent of

members of the family or group. If a member does so, the pledge is voidable and the member may lose his rights in the land. On the other hand, a member is entitled to redeem the land pledged by his family or group, and if he does so, he is entitled to use the land privately until reimbursed by the other members. During this time, he is in the same position as the original pledgee.

Both Chubb[30] and Meek[31] mention that pledge may lead to a permanent alienation of land. It may be pledged for a sum far in excess of the amount normally given for a pledge and so remain unredeemed for generations. It may thus become irredeemable, all evidence of the original transactions being lost. In this way rich men have acquired land in perpetuity.

Borrowing of land is a common practice. This owes its origin to the shifting or fallow system of agriculture. A family man whose land is in fallow generally approaches neighbors or other members of the community for a loan of land on which to cultivate. Such a loan is valid only for the period of fallow, usually from two to seven years. No cash crops may be grown.

In some parts of the country land is borrowed from friends or relatives. A man who leaves for another district may leave his land in the care of a relative until he returns, or one suffering from a guinea worm or unable to work for some other reason allows a friend to farm his land in the hope of obtaining a share of his crop.[32]

No common standards exist regarding consideration for a loan of land. The more cordial the relationship between lender and borrower, the more probable that it is that no more than a small token is demanded in acknowledgement of the lender's ownership. Often, payment in kind is demanded and this takes the form of a percentage from the produce of the borrowed land.

Leases are long term loans, not necessarily connected with fallow.[33] Leases sometimes are granted for life, the grantor reserving the right to revoke the grant on the death of the grantee, unless his permission to renew the tenancy is sought immediately by the grantee's descendants. For this, the agreed rentals are continued without further ceremony. Long term lessees are often given complete power of exploitation of the land, including the power to sublet or assign for the amount. The rent may be fixed in terms not of cash, but of a share of the produce of the land, a proportion of which goes to the neighbor.

These transferred land rights often give rise to disputes and confusion after the memory of the original bargain has faded somewhat or witnesses to the transaction have died. The descendants of the lessee could claim outright ownership by purchase made by their progenitor. Endless disputes have resulted from this type of leasing, especially now that information about the exchange value of land is becoming more accessible to some farmers.

The practice of "Kola tenancy" is a confusion deriving from the absence of information about the exchange value of land. Landowners would grant "unwanted" portions of their land for a Kola or other token payments and sometimes, according to Elias, for no consideration whatsoever.[34] Baseden records that there may be only one payment of Kola.[35] The Kola is a token which has no relation to the exchange price of the land. According to Onwuamaegbu, "a person asking any kind of favor from another usually takes with him some small gift in the form of Kolanuts and/or palm wine which the borrower and/or lender would consume. This is a friendly way of creating a friendly atmosphere in which the request could then be made."[36]

The special feature of this tenure, which has necessitated increased litigation, was the practice of the grantees to sublet, without the grantors' consent, for a substantially greater remuneration than the token they themselves had paid. The owner-grantors, alarmed at the increased value of the land they had given freely (for either humanitarian reasons or because of ignorance of land's true value) would want to share the income now payable to the grantee.

This led the government to enact the Kola-Tenancies Act. The Act defined Kola Tenancy as:

> A right to the use and occupation of land which is enjoyed by any native in virtue of a Kola or other token payment made by such a native or any predecessor in title in virtue of a grant for which no payment in money or kind was exacted.[37]

In case the above problem applied, the original grantor was empowered to apply for extinction of the tenancy and the issue would be decided by a tribunal consisting of the provincial Resident and two assessors. They would decide what compensation is due the grantor for his late perception of the market value of his land, while avenues for appeal by unsatisfied parties were left open via the high court.

IV

Reasons for Communal Tenure

ANTHROPOLOGICALLY, LAND is conceived as being God-given. As such it is endowed with a sacred character. The Ibos, for instance, conceive of land as a sort of deity who is the fount of fertility and guardian of public morality since it is witness to all transactions of man. To sell land would therefore be sacrilege.

Land is viewed as a medium uniting the past, the present and the future generations. "I conceive that land belongs to a vast family of which many are dead, few are living and countless others unborn," said the Elesi of Odogbolu.[38] A chief of Ife also intimated that "we came from the ground and we have to

go back to the ground and it is altogether out of place for anyone to think of selling the ground. They who are born and they who are yet unbegotten and they who are still in the womb require the means of support. . . ."[39]

These statements embody the view that land is a sacred trust received from the ancestors and which has to be handed down to their posterity intact. As a result the most convincing evidence that anyone can bring in support of a disputed land is that his ancestors lie buried there.[40]

The second character attached to the land is linked with another principle of land tenure, that he who clears the forest (wasteland) for purposes of cultivation, establishes permanent rights to the areas so cleared. This principle (revived in the United States by some contemporary libertarians) rests on the belief that the expenditure of labor creates rights. As Meek noted, (and also Elias), in the Dikwa Emirate of Northern Nigeria, where arable land has no exchange value (a reflection of its non-scarcity), a particular class of land known as the "firki" has long been bought and sold since its use involves heavy labor in clearing, ditching and diverting flood water. This leads to the conclusion that while land may not be sold (as collective property), improvements to the land may be sold (as private property).

Some observers have seen a natural evolution in the system of land tenure, with the communal system as only a stage in the evolution toward private property rights on land. Thus Lord Lugard put the matter this way:

> Speaking generally, it may, I think be said that conceptions as to the tenure of land are subject to a steady evolution side by side with the evolution of social progress from the most primitive states to the organizations of the modern State. . . . 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 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 pressure of population has given to land an exchange value, the conception of proprietary rights in it emerges and sale, mortgage, and lease of the land apart from its users is recognized. . . . This process of natural evolution to individual ownership is traceable in every civilization known to history.[41]

Harold Demsetz maintains that new property rights emerge as a means available to interacting economic agents for adjustment to new benefit-cost possibilities. Said he, *inter-alia:*

> Property rights develop to internalize externalities when gains from internalization become larger than the costs of internalization. Increased internalization in the main, results from changes in economic values, changes which stem from the development of new technology and the opening of new markets, changes to which old property rights are poorly attuned.[42]

Communal ownership of land should be expected when land is not scarce. When land is not scarce, its marginal product is zero as is the marginal

product of every free good (air, water, etc.) Land, thus, is not an economic good. There is no gain to society in defining property rights to land. Land must develop scarcity value from the activities of the relevant community and society before it becomes efficient to define such rights, given that the creation and enforcement of such rights by society involve some costs.

It is conceivable that 19th Century Nigeria was marked by a paucity of population. Birth rates equaled death rates and population stabilized at a level which the socioeconomic environment could maintain. At such a level, land was abundant relative to population and the marginal product of land was zero or near so. There was, therefore, no incentive to exchange land in the open market. Further, although the use of currency was not in vogue until the advent of colonization in the late 19th Century, there was some type of notional or convertible currency embodied in the use of commodity money made of cowries and manillas. Thus the system of exchange, although crude and rudimentary, was in evolution and if land had some exchange value it also could have been expressed in its monetary equivalents.

The non-scarcity value of land at a zero exchange price was subsequently rationalized by custom and tradition. Since custom and tradition have a tendency to persist even when economic conditions have changed, it is conceivable that many of the practices that summarize the Nigerian land tenure system, especially the communality of ownership, result from the fact that the mechanism for perceiving the value of land, a market, is absent due to the constraints posed by custom and tradition.

V

Conclusions

OWNERSHIP OF LAND in Nigeria is still communal and in consequence the land holding group is the family, clan, village or community. Individual possession and use of land and by implication the capacity to transfer rights to its exclusive possession by sale are still unknown in the rural areas. Modes of transfer are in the form of inheritance, gifts, pledge, borrowing, lease and the practice of "Kola tenancy". These are no substitutes for sale.

The practice of inalienability of land must have resulted from a historical period marked by a very high land/labor ratio with almost a zero exchange price for land. This was rationalized by custom which has subsequently shown great resistance to the modernizing influence of recognition of scarcity and existence of price. Thus the encroaching impact of money and markets was halted in respect to land matters at the frontiers of the agricultural sector of the Nigerian economy, with deleterious consequences on food output.

In an earlier study, the author showed that a communal land tenure system with the practice of inalienability of land was inferior to a freehold system. Though the results obtained were tentative and preliminary, the relevant variables of income, labor, months applied in cultivation, and number of acres cultivated per farmer were all significantly higher for the average freehold tenant when compared to the communal tenant.[43] The implication, subject to the limitations of the study, is that a movement towards freehold tenancy is more likely to increase food output, in the relevant agricultural sector.

Notes

1. Omotunde Evan George Johnson, "Economic Analysis and the Structure of Land Rights in the Sierra Leone Provinces," doctoral dissertation, Univ. of California, Los Angeles, 1970, p. 5.

2. Armen A. Alchian and William Allen, *University Economics,* (Belmont, Calif.: Wordsworth Pub. Corp., Inc., 1967), pp. 468–69. Also Harold Demsetz, "Towards a Theory of property Rights," *American Economic Review,* 1967, p. 347.

3. Obumneme Onwuamaegbu, *Nigerian Law of Landlord and Tenant* (Lagos: African University Press, 1966), p. 8. Also Oluwasanmi, "Nigerian Agriculture: A Study in Farming Organization with Special Reference to Technological and Economic Development," doctoral dissertation, Harvard University, 1956), p. 126.

4. Attributed to the Elesi of Odogbolu; vide *West African Lands Committee Report,* p. 1048.

5. R. O. Adegboye, "An Analysis of Land Tenure Structure in some selected Areas in Nigeria," *Nigerian Institute of Social and Economic Research, Reprint Series,* 32 (July, 1966).

6. *Ibid,* pp. 262–64.

7. No one gives what he does not own (or have).

8. Taslim Olawale Elias, *Nigerian Land Law and Custom* (London: Routledge and Kegan Paul Ltd., 1962), p. 30. Also *Amodu Tijani vs. Secretary Southern Provinces* (1921), 3 *Nigerian Law Reports,* p. 24.

9. *Ibid,* p. 6.

10. *Attorney General of Southern Nigeria vs. John Holt and Company* (1910), 2, *Nigerian Law Reports,* Vol. I, p. 3.

11. Meek, *Land Tenure and Land Administration in Nigeria and the Cameroons* (London: Her Majesty's Stationery Office, 1957), p. 216. (Hereafter cited as "Land Tenure.")

12. *West Africa Lands Committee Report,* p. 1048, para. 186.

13. Meek, *op. cit.,* p. 217.

14. M. M. Green, *Land Tenure in an Ibo Village* (London: P. Lund Company and Humphries, 1941), p. 7.

15. C. K. Meek, *Law and Authority in a Nigerian Tribe* (London and New York: Oxford Univ. Press, 1937), p. 298. (Hereafter cited as "Law.")

16. Meek, *op cit., Land Tenure,* p. 219.

17. *Ibid,* p. 178.

18. See Lewis V. Bankole, *Nigerian Law Reports,* 82 (1909), par. 152. The mode of succession to family property among the Yorubas is explained.

19. G. T. Baseden, *Niger Ibos* (London: Seeley, 1938).

20. See Chinwuba Obi, *Ibo law of Property* (London: Buttersworth, 1963), p. 178, for a schematic representation of the order of priority in the distribution of family property among the Umueke-Agbaja.

21. A. K. Ajisafe, *Laws and Customs of the Yoruba People* (London: Routledge and Lagos, Nigeria: C. M. S. Bookshop, 1924), p. 5.

22. Baseden, *op. cit.*, p. 253.

23. Elias, *op. cit.*, p. 253.

24. Meek, *op. cit.*, *Land Tenure*, p. 182. These actions are recognized in the courts of law all over Nigeria.

25. Onwuamaegbu, *op. cit.*, p. 29. Also see Elias, *op. cit.*, p. 184. According to Elias, transfers are often celebrated, Kolas are split, gourds of wine drunk and other viands taken. Those present are expected to be witnesses in the event of a future dispute, since the unwritten nature of these transactions leaves the door open to such disputes.

26. *West African Court of Appeal Report*, (1952), Vol. 14, p. 83.

27. Elias, *op. cit.*, p. 188.

28. Onwuamaegbu, *op. cit.*, pp. 26–28.

29. "If pledged land is not actually redeemed by the third generation, the rights of the pledgor's descendants cannot usually be substantiated, some native courts holding that the rightful occupiers are those who have been in occupation for the past generation." D. Forde and G. I. Jones, quoted in Onwuamaegbu, *op. cit.*, p. 22.

30. L. T. Chubb, *Ibo Land Tenure* (Ibadan: Ibadan Univ. Press, 1961), p. 27.

31. Meek, *op. cit.*, *Law*, p. 103.

32. A. T. Grove, *Land and Population in Katsina Province*, (Northern Nigeria: The Government Printer, 1957), p. 45.

33. A lease and loan differ only in that the loan does not involve payment in cash. See Mortimer and Wilson, *Land and People in Kano, Close-Settled Zone* (Zaria, Nigeria: Ahmadu Bello University, Department of Geography (1960)), p. 11. In Elias, the main difference is in the length of time involved, the lease being quasi-permanent.

34. Elias, *op. cit.*, p. 585.

35. Baseden, *op. cit.*, p. 265.

36. Onwuamaegbu, *op. cit.*

37. No. 25 of 1935, Cap. 98 of *Laws of Nigeria*, 1948, and Cap. 69 of *Laws of Eastern Nigeria*, 1963.

38. Gbateyi, the Elesi of Odogbolu, *West African Lands Committee Report*, p. 1048.

39. *West African Lands Committee Report*, p. 1047, par. 1375.

40. Meek, *op. cit.*, *Law*, p. 113.

41. Lord Lugard, *The Dual Mandate in British Tropical Africa*, 5th ed., (London: 1965), pp. 280–81.

42. Demsetz, "Towards a Theory of Property Rights," *op. cit.*, supra, note 2.

43. Don Nnaemeka Ike, "Comparison of Communal, Freehold and Leasehold Land Tenure: A Preliminary Study in Ibaden and Ife, Western Nigeria," *American Journal of Economics and Sociology*, Vol. 36, No. 2 (April, 1977), pp. 187–95.

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