*Chapter 6*

# REFORMING THE CUSTOMARY LAND TENURE SYSTEM IN SIERRA LEONE: A PROPOSAL

By Omotunde E. G. Johnson

## 6.1 Introduction

A major institutional reform that would help unleash the vast economic growth potential of Sierra Leone in tourism, agriculture, and industry is reform of the customary land tenure system. Such a reform will need to address issues related to customary law itself as well as the question of statutory strangers introduced in the Protectorate Land Ordinance of 1927. I shall deal with the latter first, because, in spite of the enormous attention given to this question, in the popular discussion of the land tenure question in Sierra Leone, it is to me the easiest one to resolve. Namely, the 1927 Ordinance could simply be repealed and other laws related to it amended as appropriate. The policymakers would then be left with the fundamental question of what to do about customary law related to land rights in Sierra Leone, which, at the end of the day, raises more difficult challenges. In this paper, I offer my views on this extremely important area which is overdue for institutional and organizational reform. It is one of the unfortunate realities in the Sierra Leone policymaking environment that government after government has been afraid to confront this issue head-on, because of the powerful vested interests that would be affected. The proposal in this paper does not ignore this reality. But in the process it does not compromise good economics and economic policymaking.

Discussions of reforms of customary land tenure in Africa are often plagued by romantic idealization of what transpires under communal ownership (see, for example, Barrows 1974; many of the papers in Downs and Reyna 1988). Such a romantic perspective ends up favouring what it considers the status quo. In the process, it ignores the reality of disorderly privatization when the state imposes statutes to obstruct voluntary privatization by the landowners, as well as inequities in land rights and in access to land among the purported landowners under communal management. This romanticism is typically coupled with a view that individualization must necessarily emerge only via coercive authoritarian order of the state, which *inter alia* would impose on the individuals, of the once communal community, costly titling, registration and policing of private property rights. In this paper, I will argue for an

institutional environment which enables individualization to be achieved via orderly evolution of land rights under a regime of freedom of contract among the owners of the land, and with government policy designed to minimize transaction (including contract) costs, ensure competition, improve markets and to provide appropriate oversight, *inter alia*, to guard against inequities in any strictly spontaneous evolutionary process.

## 6.2 The Protectorate Land Ordinances

First, let us deal with the question of statutory strangers introduced in the Protectorate Land Ordinance of 1927. According to this basic law, all land in the Provinces – formerly the Protectorate – of Sierra Leone 'is vested in the Tribal Authorities who hold such land for and on behalf of the native communities concerned'. The Tribal Authorities are there defined as comprising the 'paramount chiefs and their councillors and men of note, or sub-chiefs and their councillors and men of note'. The important provisions of the Ordinance, for our immediate purposes, here, include the following.

- A non-Provincial must first obtain the consent of the Tribal Authority in order to occupy any land in the Provinces.
- A non-Provincial may not acquire a greater interest in land in the Provinces than a lease for 50 years, but renewal is allowed for up to 21 years.
- A non-Provincial residing in a given chiefdom and who is other than a leaseholder of land within the chiefdom shall pay a settler's fee. This is in lieu of the customary tributes or labour services, due from all strangers, to the Chief. This fee may be wholly or partly waived in the case of a non-Provincial, who by his profession or trade 'is in the opinion of the Paramount Chief, conferring a benefit on the chiefdom', or who 'is employed by a person engaged in an industrial undertaking'. By the Protectorate Land Amendment Ordinance of 1935, this waiver privilege is extended to all those engaged in any industrial enterprise.

In retrospect, it is difficult to discern the British rationale for some of the stranger provisions in these Land Ordinances. It was against customary law to sell land to strangers of any origin, but land could be leased, rented, or pledged. Perhaps the British wanted to impose a ceiling on the duration of leases and to ban pledging to non-Provincial strangers. As a practical matter, though, the stranger provisions did have an economic effect, at least in those days, via the distribution of rents from leases. When land was leased to non-Provincials, part of the rent was normally distributed to the Chief and Tribal Authority and to District Councils. There was no such distribution of the incomes yielded by the land when allocated to other uses. This was tantamount to imposing a tax on income from one source while not taxingor taxing at a lower rate the

income from other sources. Other things being equal, the landowner's return from leasing to non-Provincials was thereby reduced relative to other uses. The economic impact is quite obvious.

One can understand, of course, why the British made explicit the obligation of settler fees, namely, so that non-Provincial strangers would not be subjected to traditional tribute obligations. In any event, it would seem that the simplest way to start land tenure reform in Sierra Leone is to repeal these ordinances. In that case, until reforms are instituted, regular customary law would apply.

A related advantage of repealing the Ordinances would be that, apart from communal/state lands, the law would now be clear that land belongs to the extended families. There would be no question of land being held in trust by the Tribal Authorities. The issue would then become what rights do the landowners (the extended families) have to use and transfer their family lands. It is my view that this is one of the biggest hurdles slowing down customary law reform in Sierra Leone. Without any effort on their part, the 'big men' of the communities captured a valuable asset: power over all land in their communities. Thus, for example, they have no interest in changing that part of the law which vests all land in the Tribal Authorities who then hold such land for and on behalf of the native communities concerned; the big men will in fact vehemently oppose any proposal to change the law in that area. The political leadership supported by civil society will have to wrestle it from them.

### 6.3 Land Tenure Systems and Wealth Creation

The ultimate motivation of land tenure reform is to put in place institutional arrangements that enable, as best as one can, each parcel of land to be put to its most economically valued use at any time. The objective is to ensure that the most productive users of land have access to land, and that all users of land use it efficiently. In this light, a tenure system facilitates wealth creation if the institutional framework meets three basic criteria; see Johnson (1972) for a fuller discussion of these criteria and Alchian (1977) for some useful perspectives on the economics of property rights.

First, there must be clear definition and allocation of property rights in land. This means that property rights must be established and allocated to specific owners whether they are individuals or groups. These rights must be easy to identify and verify. In addition, they must have legal and tenure certainty. Legal certainty means that the rights will be protected against the unlawful acts of others and that the results of legal actions are easy to forecast. Vague definitions and unsecure allocations of property rights militate against wealth production mainly because they increase transaction costs and inhibit exchange. The private return on investments in and attached to land will be lower the less certain and/or clearly defined are property rights in land. This will adversely affect the aggregate value of such investments being undertaken. In addition, the discount rate (time preference) in decision-making will be higher when

tenure certainty is low. Hence, the duration of investments in and attached to land when made will be shorter the more uncertain are property rights; for the higher the discount rate, the higher the present value of short-lived income streams relative to long-lived income streams.

The second condition fostering wealth creation in land is that the method of distributing wealth resulting from using land must be such as to create an incentive for economic agents to use land in its most-valued uses net of transaction costs. We are here talking of the cost–reward structure of land use. This important criterion means that the cost–reward structure from using land in production must manifest a high degree of what economists call 'internalization' of costs and benefits. With perfect internalization, the value created by any particular activity on the land will accrue to those who bore the cost of undertaking the activity. If within the land tenure system the cost–reward structure fully internalizes benefits and costs, each user of land is motivated to use land in space and time so as to yield the maximum wealth from the land. Any reduction in wealth as a result of a user's misallocation implies an equivalent reduction in his or her wealth.

The third criterion for a land tenure system to facilitate general economic efficiency is that the system must ensure freedom and legal enforcement of contracts which do not impose damages on third parties for which the contracting parties are not made to compensate. Restrictions on transfer via sale, renting, or leasing, according to this criterion, can seriously reduce economic efficiency. Restrictions on sale, for example, raise the cost of transferring landownership for certain uses and users. The result is to effectively reduce the number of ways of capturing wealth from one's land. There are three noteworthy effects of placing major restrictions on sales compared with placing few or no restrictions. First, the value of the land (in a utility sense) to an individual is lowered. Second, the supply price of funds to an individual who wants to use land as collateral is bound to increase; the landowner's access to credit in regular credit markets is adversely affected, *other things being equal*. The supply of credit to a particular borrower is, of course, affected by factors other than the quality of collateral. In addition, the utility of land as collateral in credit markets is affected by the quality of the land market and by the working of the legal system as it operates in this area. Hence, despite the correctness of the proposition, the effect of having land (which could be used as collateral) on an individual's access to credit (formal and informal), should not be exaggerated.

Third, when there are major restrictions on sale of land, the profitability of investments in and attached to land is lowered. Once again, such investments will be discouraged since the individual investor is restricted in his or her ability to alter, within any given period, the composition of his or her wealth in response to changing tastes and opportunities. In equilibrium, the total amount of these investments undertaken would be a smaller proportion of aggregate investment the greater the level of restrictions on transfer through sale. Moreover, in equilibrium, the last dollar invested in and on land would yield a higher net present value than the last dollar invested in other assets for

which such restrictions do not exist, implying a deadweight loss in wealth to society.

## 6.4 Evolution of Land Rights

Looking at the history of the evolution of land rights in those areas of Sierra Leone where customary land law prevails, there are four justified statements that can be made. First, there was a time when communal ownership made neoclassical economic sense. Second, over time the systems were evolving towards individual ownership. Third, the British colonial regime instituted a statute which in effect not only stopped the orderly evolution of the system but placed the land under the guardianship of so-called tribal authorities and subjected the customary systems to legal principles which imposed unclear standards to the natives of 'natural justice, equity, and good conscience' (see Johnson 1972). Fourth, the systems, following this colonial interference, in the face of economic and demographic pressures, are now experiencing disorderly evolution towards individualized rights, with the latter unclear both in their nature and their status in law, coupled with the additional problem that they are leading to major transfers of wealth towards the elites in the various communities.

To elaborate, there are economic situations under which a communal system of land rights is efficient and there is no case for enforcing strict private ownership of land. Under a regime of freedom of contract allowing rights to evolve spontaneously, the community members in such circumstances will not have an incentive to privatize. Such situations arise when land is not a scarce commodity. If land is not scarce, there is no positive value to society of creating clearly defined property rights in the land. Moreover, given that we start with a system of communal rights, the creation and enforcement of private property rights entail costs to society. Therefore the scarcity value of land must rise to some minimum before it becomes efficient for society to create such rights (see Johnson 1972). Indeed, one device to ensure that property rights creation and enforcement are efficient is precisely to allow individuals or groups the freedom to contract to establish private rights over land and to introduce a legal framework for enforcement of these contracts, with the cost of enforcement being borne by the contracting parties themselves.

A tendency for land tenure systems to move along evolutionary paths towards individual ownership has been noticed for a long time (see, for example, Lugard 1926, chapter XIV). Using *a priori* economic principles, I advanced the following thesis many years ago on the evolution of communal systems of land tenure (Johnson 1972, 1976b): as the scarcity value of land increases, private ownership of land will increase and/or there will be a movement towards private ownership of land. Briefly, the argument is as follows (Johnson 1972, 1976b). As the scarcity value of land increases, it becomes profitable to invest in land and to economize on use of land. But the cost of policing one's investments to

ensure that one reaps a 'satisfactory' fraction of the returns is much higher under communal ownership than under private ownership. *Inter alia*, under communal ownership an individual must contribute to the policing of all the other members' use of all land to ensure proper use, whereas under individual ownership he or she has to police the use only of his or her parcel(s). High policing costs reduce the incentive of individuals to engage in investments that improve or conserve land as well as in certain activities that economize on land use; in equilibrium, actual policing costs incurred to achieve any given objective tend to be rather high. Thus, individuals find that for any given amount of investment their wealth under communal ownership is lower than it would be under private ownership. But, as we stated earlier, the positive cost of privatizing ownership reduces the profitability of privatizing when the scarcity value of land is 'low'.

The cost of privatizing comprises mainly the sum of the opportunity cost of all the resources – labour, etc. – used in intra-group contracting to create individual ownership to specific plots of land, and the costs involved in implementing (including policing) the agreed terms of the contract. As the scarcity value of land increases, the increasing return on investments that improve or conserve the land and indeed that economize on land use, cause the potential wealth of the individual, if his land is privatized, compared with his actual wealth under communal ownership of the same land, to diverge more and more. This difference may be considered the benefit of private ownership. As the scarcity of land increases, this benefit becomes greater relative to the cost of privatizing, and more and more individuals in the community will seek individual ownership.

Empirically, the hypothesis implies that increases in the prices of goods in whose production land is an important factor, increases in the intensity of use of land and increasing population density will be positively correlated historically with increasing privacy of ownership and with reductions in the size of groups having communal ownership to land in any given area. Empirically, the hypothesis also implies that, if we compare different areas within a region of Sierra Leone where customary land tenure prevails, the incidence of private 'ownership', despite its unclear status at the moment, will be most significant in areas of greatest population density and/or with comparative advantage in the production of commodities and services whose prices have risen most sharply. Indeed, for the last half-century, in Sierra Leone, the evidence is that the incidence of individual 'ownership' has been greatest where cultivation of tree crops, swamp farming, modern buildings and population growth have been most intense (see, for example, Greene 1969; Hussain 1964).

## 6.5 The Major Drawbacks of the System

The underlying source of the problems with the customary land tenure system is that the 1927 statutory law froze the evolution of the system, without seeking the general consent of the population of owners of the land. As the economic

situation has been changing in the country, and given the accompanying failure of public policy to address certain issues, a set of problems have resulted, from the perspective of economic efficiency (static and dynamic). One problem is what can be called creeping, disorderly, and non-transparent privatization, which is aggravating inequalities in access to land among family members with equal rights in principle. In other words, certain individuals with power and influence in the families and communities are able to obtain large stretches of land, which they treat and use as if they have individual ownership, subject only to the constraint on sale to strangers and some residual uncertainty as explained below.

There are serious legal uncertainties of property rights (see also Renner-Thomas 2010) as well as 'high' enforcement costs of contracts, in the customary law environments. There are, in turn, mainly three interrelated sources of these, namely:

1. the nature of statutory law and the approach of law-enforcement agencies vis-à-vis individual ownership under customary law;
2. uncertainty as to the nature of one's rights under the customary law(s);
3. the unwritten nature of customary law and most 'contracts' (see Johnson 1976b).

The prevailing idea in the statutory law is that the landholding group is no smaller than the 'family', that is, the extended family. Moreover, the Tribal Authorities, as the guardians of the system for and on behalf of the native communities, effectively have ownership rights over all the land. This all means that if, for example, an individual to whom a block of 'family land' has been allocated in the past maintains it by large investments, and the central government or some stranger wants it for some purpose – say for large-scale farming or to build a road – the distribution of the rent or other compensation is not easily predictable and *ex ante* transparent. Indeed, the individual's investment could be ignored in that distribution. Also, some other member of the family who had long departed the area can still claim rights to the parcel of land later on and the investment of an individual in and on that land could be ignored in the settlement of the claims. It has been known for some time that when people establish plantations and make a success of them, others who have some semblance of claim to the land through ancestry, for example, come forward with their claims (see, for example, Hussain 1964). The resolution of such disputes can be very uncertain.

Furthermore, there is often uncertainty regarding the nature of rights under the law. This uncertainty arises at two levels. First, the limits to the powers of Tribal Authorities and elders in the family vis-à-vis ordinary family individuals and strangers are often not as clear as is desirable. Strangers, for example, have lost tenancy and all their investments for vague 'crimes' such as 'disloyalty and misconduct' to the Tribal Authority. This leaves open the door to simple exploitation and harassment. Second, the application of native law, say, on

appeal to a higher statutory court, has always been subjected to 'natural justice, equity and good conscience', which leaves wide discretionary powers to the law-enforcement agencies.[1]

Perhaps the most serious source of uncertainty and high enforcement cost is the unwritten nature of customary law, property rights and contracts. For example, the 'ownership' of most parcels of land are not clearly prescribed and known, and boundaries are often unclear, consequently leading to much bush dispute. With regard to contracts, it is true that, even with privatized land in an environment with an elaborate and developed legal system, the details of an agreement (including how to handle contingencies) do not all need to be written in a contract. This is one way in which trust, and most of all generalized trust, reduces transaction costs in relationships (see Johnson 2007, chapter 3; Macauley 1963). But that is a far cry from having only verbal contracts or having written contracts that are very general in their content and have very few details or references to the handling of major contingencies. Moreover, as in other parts of Africa with customary land tenure (common property rights), certain types of land 'sales' have been taking place and apparently approved by the families. This can be applauded as evidence of dynamism in the traditional systems (see, for example, Platteau 1995). But the status of such 'sales' is rather unclear. In fact, it is not clear whether these transactions are considered sales by the family members or simply some form of pledge or informal long-term lease. At any rate, in strict customary law outright sales of land are forbidden.

When land is permanently allocated to a family member, or when it is pledged or transferred in any other way, written contracts are very seldom made. Instead, the contracts are made verbally in front of witnesses. This gives too much scope to double-dealing. Also witnesses may die or give different interpretations to the same agreement.

The Chief and the elders of the community play an important role as registrar with regard to boundaries between families and villages. This is why bush disputes between individuals of two different families soon become interfamily disputes and those between individuals of two different villages become intervillage disputes.

Disputes often arise as to who first cultivated an area, and/or as to who are the direct descendants of the original cultivator. The original cultivator of a bush and his descendants own the bush. If no written records exist as to the original developer or his legitimate descendants, disputes over ownership rights are bound to occur as land becomes more scarce.

## 6.6 The Reform Sceptics

There are many persons both within and outside Sierra Leone – some scholars, others just interested observers, with or without a stake in the system – who

[1] See, for example, Native Court Ordinance, Laws of Sierra Leone 1960, Chapter 8, Section 5.

do not see the value of, or the 'need' for, a coherent official approach to land tenure reform. I will call these persons 'sceptics' of reform. Unfortunately, these sceptics have diverse perspectives on what is exactly going on within these systems. All they seem to agree on is that changes are taking place in the nature of the system; that is, there is an evolutionary process occurring.

First, there are those who argue that the current system works well and there is no need to change the customary form of landownership and organization for determining land use. One strand of this argument in Sierra Leone is that the possibility of leasing is sufficient to ensure that efficient users who are strangers have access to land. Leasing, in other words, can ensure the efficiency in use of land. These particular sceptics ignore the fact that leases do end and renewal is uncertain. Hence, the nature of investment in and on land will be affected. In particular, certain forms of long-term investment will be disadvantaged by leasing, unless a system of fair compensation is formalized, made transparent and enforced with certainty. In addition, a leased property cannot typically be used as collateral for credit. Moreover, the leasing 'market' is not anywhere near efficient. Indeed the process of getting a lease is an administrative process and there is no open organized market.

The second type of scepticism is the argument that those who favour facilitating privatization are trying to impose privatization, and indeed individualization, of communally owned land. The sceptics believe that this will have no beneficial effects on efficiency of land use, while at the same time having adverse social effects: in particular, it is believed that privatization will lead to the emergence of a poor landless class and undesirable concentration of landownership. The main problem with this argument is that it misrepresents the analytics of persons like this author who want to see privatization allowed to *evolve* rather than being imposed. In other words, the idea would be to permit freedom of contract, including the right to privatize. The proposition is that this evolution was historically taking place in Sierra Leone. It was the British colonial regime that froze the evolutionary process, without pressure or demand of the native populations. The current sceptics are also in denial of the fact that the evolution now taking place is disorderly, *inter alia*, because it lacks status in law and because it does not ensure that the rights of all the joint owners of land are fairly treated, especially given the hierarchical structures in decision-making within certain families and groups. As such, among other things, it is resulting in grave inequalities in land use and ownership rights.

The third sceptical view is that if the state takes an active role in facilitating privatization it is likely to overreach by, for example, pushing too hard and fast for land registration and titling. Both titling and registration will raise the value of a property, because of their effects on security of property rights (see, for example, Lanjouw and Levy (2002) for an empirical study on the effects of titling on property values). It is rightly argued that such registration and titling are costly, which is consistent with the analysis in this paper. But the argument as put by the sceptics is unhelpful to policymaking. Rather more rational is the argument that titling and registration should be subjected to

social cost–benefit calculation, some elements of which will be determined by the individuals of the landowning groups given the principle of internalization of costs and benefits. Such an approach would be automatic under a regime of freedom of contract. In addition, the argument in this paper emphasizes that the government should have clear oversight responsibility; in that capacity, the authorities would develop a coherent strategy to address the sort of problems that are likely to show up if the evolutionary process is left only to unmitigated spontaneous order. To underscore the point, the reform process being proposed would proceed in light of cost–benefit analysis, with internalization of costs and benefits to the private agents who 'own' the land, and with well-structured oversight by the central authorities. Moreover, as part of the oversight strategy in monitoring the evolutionary process, the authorities would ensure that titling and registration do not lead to unfair transfer of land wealth to the elites of the traditional societies involved. In fact, one of the advantages of titling programmes, properly and economically implemented, would be that they benefit the weaker and poorer members of the communities concerned. It would be important to incorporate this distributional aspect, which has value to social and political stability, into the social cost–benefit analysis and into the distribution of the public cost of managing and overseeing the evolutionary process. One possible means of achieving this would be through the cost structure (the schedule of charges for different types of services, which may vary according to the location of the land and the income and wealth of the persons involved) for registration and titling per acre, town lot, or square foot, or whatever the unit of measurement for land size.

It is useful to state clearly the aspects of the sceptics' warnings that I believe to be justified (see also Platteau 1995) and that should not be ignored in an approach that argues in favour of freedom of contract, facilitating the evolution of the customary land tenure system towards privatization – which this author believes is where the system will end up under a regime of orderly freedom of contract – with appropriate official oversight. One justified warning is that private property rights may be costly to establish and enforce. Another is that, left unregulated, privatization may result in adverse welfare externalities, especially because the relevant markets, even when they exist, may not be competitive and are unlikely to be perfect. In addition, privatization without appropriate public policy may hamper the emergence of trust and certain forms of cooperation, which worked well at some historic time period under the regime of common property – certainly before the British interfered with the system. Under private ownership, in today's world, the absence of trust and cooperation of certain forms may be harmful to efficiency of use of the land, including cooperation that keeps the land well conserved (see, for example, Seabright 1993).[2] Despite this, the possibility of private owners overexploiting

[2] Indeed cooperation is important in the development process as a whole and any policy which brings about or aggravates a cooperation deficit must be dangerous to the development process in a country (see Johnson (2007) for a general discussion of the importance of cooperation and the sources of cooperation deficit in the African setting).

the land is no grounds for opposing privatization as long as internalization of costs and benefits prevails. This way, the landowner who does not take care of his or her land fully suffers the resulting wealth loss.

Finally, it is useful to emphasize that the approach taken here is consistent with those who emphasize that self-governance under common property can be socially efficient in both a static and dynamic sense. Freedom of contract in determining the pace and type of evolution in property rights is an aspect of self-governance. Indeed, the argument here is that the statutory interference with the evolutionary process of customary land tenure has contributed to its dynamic inefficiency. It is, of course, quite possible that without such interference the state may still have found good reason to interfere in the interest of intra-group equity in the evolutionary process. But that would have been a different matter altogether.

### 6.7 Possible Short-Term to Medium-Term Reforms

I shall now turn directly to further elaboration of the details of the proposed reform plan, involving freedom of contract of landowners and oversight by the country authorities. I would like to differentiate the short-to-medium-term period from the long term. In our present context, the former period in my view should last at least five years and could (via consensus) last up to ten years or even longer. In this section I discuss reforms during the short-to-medium term. Long-term reforms are addressed in the following section.

It is possible to make immediate reforms to the current traditional system in Sierra Leone, in a fashion that goes a long way towards satisfying the criteria required for a land tenure system to facilitate wealth creation mentioned earlier, while still leaving ownership of land at the level of the extended families. The four most important immediate reforms would be:

- repeal of the Protectorate Land Ordinances;
- establishment of an explicit legal right for all Sierra Leoneans to live anywhere without permission of some local authority and the right for them to be individually responsible for their own actions under national and local laws;
- clearly defining and allocating property rights in land to extended families and to individual members of such families;
- granting the right to rent and lease to all comers, under terms that are freely negotiated between the contracting parties.

Among these reforms, establishing clear definition and allocation of property rights in land to extended families and to individual members of such families is, in my view, the most difficult element in the above reform agenda. Clarity and certainty of rights are among the ultimate objectives here. The issues that will need to be addressed include the following.

- What is meant by family ownership?
- What are the rights of individuals within the family?
- Who are the members of a family that have rights to some particular parcel of land?
- Do the extended family members have the right to sell land and, if so, how is the family to decide?
- How should the family make decisions in contracting to lease or rent family land?
- Should all the rules concerning ownership and individual rights be uniform throughout the country?
- If diversity of rules is permitted, what rules will be uniform and what are the limits on local autonomy?

These are some of the issues that will need to be addressed. Factors such as traditional intra-family power structure, existing decision-making procedures within families, public interest in equity and equal worth of all persons, and diversity in existing traditions across the country must all come into play as the experts and stakeholders deliberate over the answers. The rules must then be codified and made statutory.

There are other reforms that would be needed as well, following diligent investigation and analysis of current customary law and practices in the country. Among these, two are noteworthy.

First, the application of customary law has, since the days of the British, been subjected to 'natural justice, equity, and good conscience' (see, for example, Johnson 1972). This leaves wide discretionary powers to the law-enforcement agencies, as mentioned above. This issue will need to be addressed so that the status and scope of this statutory authority of the judiciary and/or oversight agencies can be clarified.

Second, the authorities should promote a culture of written contracts. As also mentioned above, many bush disputes and other problems have arisen because many (if not most) agreements (pledges, loans, gifts, exchanges) are unwritten. When the reform authorities investigate the details, they will discover that, because of the unwritten nature of property rights and contracts over several generations, the ownership of many parcels of land is not clearly prescribed or known, and boundaries are also often unclear. Indeed, when one reads transcripts of many Native Court cases and reports in central government administrators' files, going as far back as necessary, it is striking how many bush disputes are a consequence of unwritten agreements. Many of these cases, which start with disputes between individuals of two different families, *inter alia*, result in serious inter-family and inter-village disputes.

In the modern world, many types of profitable agreements for all sides are discouraged if there is a fear that word-of-mouth agreements are too risky or that the rights of a person claiming 'ownership' of a parcel of land are uncertain.

This also means that contracts must be resolutely enforced by the legal system. The reforms will therefore need to clearly specify and publicize the nature and scope of enforceable contracts. The oversight agency mentioned below could no doubt play a leading role in this reform and development process.

### 6.8 The Long-Term Evolution of the System

If, as part of the short-term to medium-term reforms, extended families are allowed to sell land, then the decision makers would, in effect, have decided that they want the system to move towards individual ownership. For I do not believe it would make sense to restrict sales of family land only to other extended families.

If, after due consultation with the other stakeholders of the system, the Sierra Leone authorities decide that they want to permit the evolution of customary land tenure towards individual (fee simple) ownership, they must then decide whether they want the evolution to take place under conditions of freedom of contract (with appropriate oversight from the authorities) or under authoritarian centralized control. I have argued above that if the tenure system is allowed to evolve under conditions of freedom of contract – that is, if individuals and groups are not prevented by some central authority (the state) from making institutional changes that they deem fit – as the real values of long-term investments in and on land increase, the system of ownership rights will evolve towards individual ownership. Decentralized decision-making and internalization of costs and benefits would be two advantages of the freedom-of-contract approach over the centralized authoritarian approach, making efficiency and hence optimal pace of privatization attainable without complex and continuous cost–benefit analysis. The social efficiency of the process would be further promoted by appropriate enabling public policy environment and oversight.

If sales of family land are barred in the immediate future, as discussed earlier, then an important question would become whether, over time, restricting sales will make sense if the system is allowed to evolve towards individual ownership (that is, away from extended family ownership). One would think not. As an aspect of individual property rights, the right to transfer via sale, in addition to leasing, renting and pledging, will no doubt evolve with privatization.

What would be entailed is straightforward: families would be given the right to make permanent allocation of land to individual family members, who will then regard their individual allocations as their own private property. The agreements would be written, and supported by surveys and registration at a reasonable cost. The costs would be borne by the families, who would decide on the distribution of such costs among the family members. Families would decide on individualization moves at their own discretion. In this context registration, for example, which is costly, would occur in accordance with the

equilibrium pace of individualization and would thus commence with the most economically valuable areas, like swamp lands and heavily populated areas.

I would suggest that the right to transfer by lease, rent, pledge or sale of land be granted immediately upon individualization. Whether this freedom of the individual should be unconstrained immediately the reforms are instituted is a legitimate issue for debate. I see no reason why this freedom should be constrained outside of some minimal oversight requirement, as mentioned below.

With regard to the imposition of some minimal constraint on the freedom of the individual to transfer land, the authorities, for instance, could require that, for a specified period after an individual obtains sole ownership from the family, all agreements to lease, rent, pledge, or sell by that individual must go through some review by the oversight agency in order to ensure that the individual receives a 'fair' price.

Whatever the case, one should not be opposed to major land redistribution over time, as do some opponents of individualization of landownership (see, for example, Barrows 1974). The relevant issue is whether any long-run inequality of landownership is socially efficient. If the land markets function efficiently (something that I have argued in this paper should be part of government policy to ensure), transfers of land by sale do not by themselves alter wealth distribution, only the forms in which wealth is held by different individuals.

## 6.9 Communal Land

Where there is still land that is not family land or designated state land, but rather community or communal land, the governance of such land may need clarification in today's Sierra Leone. This, no doubt, will be done taking into account traditional practices and the current Local Government Act in place. Again, the conclusions of such a review and clarification must be written into law.

Whatever the case, there are economic efficiency considerations that should inform and guide the governance arrangements for communal land. In particular, those persons allocated communally owned land at any point in time should be allowed to sublet and to sell their *investments* in and on land. The freedom to sublet increases the probability that the most productive users of the communal land will ultimately gain access to the land, irrespective of the original allocation of the communal land. It 'increases the probability' rather than ensures because the wealth effect of the original allocation plus the existence of transaction costs in the secondary allocation process will affect the equilibrium (final) allocation. The freedom to sell one's investments in and on land also increases the probability that all socially profitable investments in and on land will be made. Here, again, it does not 'ensure' this because of the additional risk for the individual who is making the investments of not

being able to fully capture the net return of the investments, as compared to a situation in which he or she privately owns the land.

It is clear, then, that the governance arrangements pertaining to communal land will affect the efficiency of allocation and use of land and of investments in and on land, under communal ownership, by affecting

1. the efficiency of the primary allocations,
2. the transaction costs and efficiency of private secondary allocations,
3. the certainty with which individuals expect to capture through sale (or any other method) their investments in and on land.

In this regard, the governance arrangements must find ways to address

(i) possible corruption and inefficiency in the primary allocations of land,

(ii) the adverse effects of risks of insecure property rights related to investments in and on land under communal, as opposed to private, ownership.

## 6.10 Oversight

Oversight has value in the areas of land rights, land transfers and land use. But, as regards the reform process under discussion in this paper, it is useful to stress the importance of heightened and vigilant oversight during some transition period, until it is rational to leave matters to the market with relatively minimal oversight. For many years, the land market that will be needed to support the new system will remain underdeveloped and inefficient. There will be asymmetries in bargaining power and in information that, without vigilant oversight, will be grave enough to lead to undesirable exploitation. Buyers, for example, may be duped if owners are able to sell the same plot of land to multiple buyers and then disappear.

*Pricing* would be a difficult issue for a long time as the market develops. One way to alleviate this problem without strict price control and regulation is by mimicking an auction process. All offers could be made public, with counter-offers made acceptable over some limited period of time before a deal is closed. This should work for both buyers and sellers. For example, if someone wants to buy land they could advertise on some bulletin board monitored by the oversight agency. Similarly, a seller could advertise on the board and any offers would be good for a certain number of days while the seller waits for a counter-offer. The oversight agency could also collate information and act as a real estate agent would act in a pure market situation. The agency could be authorized to charge commission for such services. It would be important, though, to separate (that is, put a Chinese wall between) the pure overseeing branch of the agency and the real estate agency branch. This latter branch should have a sunset period. The nature of oversight would, of course, change over time as the land market develops.

There would be a great opportunity to get the records straight from the beginning. Proper recording of surveys, titles and sales, these records being computerized and with proper backup facilities, would give these areas of Sierra Leone a blessing that even the Western Area does not have at the present time. I would reiterate that the timing of surveys and formal titling procedures should preferably be decided by the families themselves, which would be the norm in a regime of freedom of contract in the evolutionary process proposed in this paper.

The reform process under discussion could thus give Sierra Leone the opportunity to develop an orderly and well-functioning real estate market, with proper codes of conduct and qualifications for real estate agents and brokers, underpinned by sound information systems and proper records.

## Bibliography

Alchian, A. 1977. Some economics of property rights. In *Economic Forces at Work*, pp. 127–149. Indianapolis, IN: Liberty.

Barrows, R. L. 1974. African land reform policies: the case of Sierra Leone. *Land Economics* 50(4):402–410.

Downs, R. E., and S. P. Reyna. 1988. *Land and Society in Contemporary Africa*. Hanover, NH: University Press of New England, for the University of New Hampshire.

Greene, L. C. 1969. The system of land tenure in Sierra Leone. Master's Thesis, University of Durham.

Hussain, M. H. 1964. *Report to the Government of Sierra Leone on Customary Land Tenure in the Context of a Developing Agricultural Economy*. Rome: Food and Agricultural Organization.

Johnson, O. E. G. 1972. Economic analysis, the legal framework and land tenure systems. *Journal of Law and Economics* 15(1):259–276.

Johnson, O. E. G. 1976a. African land reform policies: the case of Sierra Leone. Comment. *Land Economics* 52(1):117–121.

Johnson, O. E. G. 1976b. Economic aspects of the structure of land rights. In *African Agriculture: Economic Action and Reaction in Sierra Leone* (ed. J. Levi *et al.*), pp. 203–236. Farnham Royal, UK: Commonwealth Agricultural Bureaux.

Johnson, O. E. G. 2007. *African Economic Development: Cooperation, Ownership, and Leadership*. Lewiston, NY: Edwin Mellen.

Lanjouw, J. O., and P. I. Levy. 2002. Untitled: a study of formal and informal property rights in urban Ecuador. *Economic Journal* 112(482):986–1019.

Lugard, F. D. 1926, *The Dual Mandate in British Tropical Africa*. London: William Blackwood & Sons.

Macauley, S. 1963. Non-contractual relations in business: a preliminary study. *American Sociological Review* 28:53–67.

Platteau, J. P. 1995. Reforming land rights in sub-Saharan Africa: issues of efficiency and equity. Discussion Paper, United Nations Research Institute for Social Development.

Renner-Thomas, A. 2010. *Land Tenure in Sierra Leone: The Law, Dualism and the Making of a Land Policy*. Milton Keynes, UK: AuthorHouse.

Seabright, P. 1993. Managing local commons: theoretical issues in incentive design. *Journal of Economic Perspectives* 7:113–134.

Sierra Leone. 1960. *Laws of Sierra Leone in Force on the 1st Day of January 1960*, revised edition. Waterloo & Sons.