

## CHAPTER I. SYSTEMS OF TENURE

In discussing the subject of land tenure it is necessary to specify the particular stage in the social structure to which reference is made; different systems may be found at different stages. For instance, in England the majority of farmers hold their land by cash tenancy, but they rent it from persons who hold it by private ownership. The importance of the subject from the economic point of view arises chiefly out of the relation existing between the actual farm operator and the land, and it is this aspect which is here considered. Land tenure systems may be arranged in the following series, in which there is in general a progression in the direction of individual control:

Customary—Tribal, Feudal.	Contractual—Labour Tenancy, Share Tenancy, Cash Tenancy, Emphyteusis, Owner-Occupation.
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The term customary tenure may be used to denote those systems, whether tribal or feudal, in which the land is held by the cultivator under conditions determined by his social status in the community, rather than by virtue of any contractual arrangement entered into by him.

## CHAPTER II. TRIBAL TENURE

### COMMUNAL ELEMENTS

In advanced communities land is regarded as a form of property, the ultimate ownership of which must rest with some person or body. Among the most primitive communities it is not so; where sufficient space remains at the disposal of the population, land is considered a free good, like fresh air. The conception of a capital value or a rental value has not arisen. Landed property 'is the area from which the whole horde, clan or settling community derives its means of livelihood and subsistence. A claim to the private ownership of special pieces of land within the district is generally not recognized.'

A distinction is drawn between land proper, which is the gift of nature, and capital, which is the product of human labour. 'The principal source of individual property in a non-stratified community is derived from labour, as the planting of a tree, vegetables, cereals, etc., or the building of a house' (3). Among the Kipsigis of Kenya, for instance, 'a man's property is that upon which he has done work, which he has acquired by his own effort, e.g. the tree he has felled for firewood or honey boxes, the house he has built, the grain he has planted, the cattle he has raised or bought with his own property. That which occurs naturally is given by God to all equally, the earth, the grass, the trees, the salt lick, the wild animals. These only become a man's property when he has done work on them' (4). *Manu* says 'land is his who first cleared the jungle, as the deer is his who first brought it down'.

The primitive system under which no claim to particular pieces of land is entertained, each cultivating the soil or grazing his livestock where he will, though not infringing the equal rights of other members of the same community, may be designated 'communal tenure'. At the present day it is found chiefly among

pastoral or hunting communities and in areas where the supply of land is abundant. In British Guiana, for instance, 'the aboriginal tribes moved about the country as their fancy dictated. They lived chiefly by hunting and fishing and grew only sufficient cassava—their staple food—for their own requirements, squatting where their inclination took them and moving on again in the same way' (5).

The communal element operated only within the particular tribal group, and was accompanied by the delimitation of 'spheres of influence', based on original hunting or grazing rights, first clearing, conquest, or first arrival, and these rights developed in course of time into tribal tenure. Among the Bushmen of South Africa 'each band claimed rights of ownership over a particular stretch of territory. Within this it wandered freely, and any intrusion on the part of strangers was forcibly resented', and 'every Hottentot tribe in the Cape had its own territory, into which strangers might not intrude for hunting or pasture without first obtaining permission' (6). In Arabia 'men have looked upon the desert as a barren land, the free holding of whoever chose: but in fact each hill and valley in it had a man who was its acknowledged owner and would quickly assert the rights of his family or clan to it against aggression. Even the wells and trees had their masters, who allowed men to make firewood of the one and drink of the other freely, as much as was required for their need, but would instantly check anyone trying to turn the property to account and to exploit it or its products among others for private benefit' (7).

The same factor entered into the demarcation not only of tribal land, but also of clan and family land and is one of the elements in the land situation in most of the 'native' areas to-day. In the Kikuyu country of Kenya 'with the exception of the Embu and a section of the Meru, all the clans of the Kikuyu Province trace their land claims principally to an original exercise of hunting rights. The hunting area later became the *Ngundu* or land claim' (8). The word *githaka*, a term which has its equivalent

in other East Africa languages, as *kithaka* in Ukamba, *kichaka* in Ki-Swahili, *kitsaka* in Nyika, and *butaka* in Uganda, meant originally the bush land over which a clan claimed control.

We may look upon claims based on this consideration either as a delineation of political boundaries or as something equivalent to the schoolboy's 'bags I'

Tribal tenure exhibits a remarkable resemblance everywhere in its basic principles. The relative importance of the various elements entering into it may vary in different groups—the influence of magic and ancestor-worship, the degree of patriarchal or feudal control, the attention given to land matters as a whole. But wherever we look, in areas the population of which are spoken of as 'native', whether among Nilotes in East Africa, Bantu in East Africa or South Africa, Negroes in West Africa or the Negritoes and mixed races in the Pacific islands, the broad principles are similar.

The second element entering into tribal tenure is the right of usufruct accorded to the person who actually undertakes development. The recognition of this right is almost universal in primitive systems. A man who clears the forest, breaks the ground and plants crops is left in undisturbed possession of the land so long as he continues to use it. Plantations likewise remain the property of him who establishes them. Sometimes, indeed, where cultivators are allowed to cultivate land belonging to another clan or family, plantations remain the property of the planter and thus there are cases where the land belongs to one person and the crops to another. This is especially common in territory belonging to people of Arabic descent, as in the Anglo-Egyptian Sudan and on the coast of East Africa.

Sometimes the right established by development is permanent. In other cases it lasts only so long as the occupant continues to cultivate the ground, and lapses if he ceases to do so. In the Hehe tribe of Tanganyika 'plantations are the property of the occupant so long as he remains in residence' but 'if he lets a

complete planting season pass without cultivation anyone else may plant crops there and if the headman confirms the title the land becomes his. Ownership is thus only a right of occupancy, valid so long as occupancy is effective' (9). Among the Kipsigis of Kenya 'so long as a man keeps a piece of land in cultivation he has the right to use it, but as soon as he leaves it to go back to bush or grass it becomes public property again' (4).

Land not beneficially occupied has often been mistakenly assumed by Europeans to have no claimant. In fact, however, the natives themselves have generally well-defined claims to the undeveloped land in the vicinity of their cultivated plots or hut enclosures. Such undeveloped land is used for grazing of livestock, as a source of fuel and building and thatching materials, and as a reserve for the potential cultivation needs of posterity. The claims may reside in the tribe or clan and thus bear the aspect of common rights, or in family groups, or even, in extreme cases, individuals.

Thus, in Ashanti 'there can be no such thing as land without an owner. Every foot of land, indefinite or uncertain as topographical boundaries may be, belongs to someone... the only way in which land could come to be ownerless would be by the extinction of a family group. Supposing that in such a case provision had not been made for a (slave) to succeed... Ashanti law made full provision for such an emergency and such land would be at once absorbed by the stool under which the extinct family had held it' (10). Each adult member of a Kikuyu clan 'has part interest in the reserve areas of uncultivated land which remain undistributed' and 'can claim the right to have a portion of it allotted in the usual way for cultivation' (11). The alienation of apparently unoccupied land in Kenya to European immigrants produced an aftermath of unrest, to remove which was one of the terms of reference of a Land Commission appointed in 1933.

## MAGICAL AND RELIGIOUS CONSIDERATIONS

In many tribes the incumbent has to account not only to his posterity but also to his ancestors for his use of the land. He is only a single link in an unbroken chain, a trustee who has a claim varying from a privilege to a right to the use of the land during his lifetime. 'The Ashanti land laws of to-day appear but a logical outcome of a belief which, in the not very remote past, considered the living landowners as but holding as it were tenancies-at-will from the dead, as being the trustees of the latter' (10), though 'this belief in the spirit ownership of land, with its attendant legal consequences, seems, however, considerably modified by the Ashanti belief in the limitation of the field of operation of departed spirits to the people of their own clan'. The burial-place of ancestors has a special significance.

In the northern section of Togoland 'all lands are said to be associated with a deity, who has to be propitiated by his high priests before a grant can be made... the deity is believed to dwell in the land and his presence inspires awe and reverence and checks illegitimate occupation'. Hence 'the original dominion over land would appear to be vested in religious lords... Their designation is *Tindana*, which means "owner of the land".' Rattray notes that in Ashanti any transaction in land not strictly in accord with ancient tribal custom would be accompanied by offerings of bowls of rice or other morsels to the spirits.

## CLAN AND FAMILY CONTROL

Controversy has frequently raged over the question as to whether the tenure in a particular tribe is individual or otherwise. We have seen that in many tribes cultivation carries with it the right of permanent occupation and usufruct heritable according to established custom. The matter is really one of definition. In practically all cases under tribal custom, before it became modified by alien conceptions, the rights of an individual cultivator, even though he might consider himself the owner of the

land, fell far short of those of a full owner in the modern sense.

Seigniorship is a marked characteristic of tribal, as of feudal, tenure. The system 'embodied an unbroken chain of responsibility—the responsibility of the headman for his people, of the head of a kraal or family for its members and of every individual of a tribe to the chief'<sup>(12)</sup>. Control is exercised by paramount chief, lesser chiefs, tribal elders and clan and family heads and councils. The powers exercised over land matters by the various authorities vary from tribe to tribe. Sometimes a complete stratification of controls is maintained; sometimes the powers of the chiefs and clan heads have become tenuous to the point of disappearance. But seldom, even in the most individualistic of the variants, has the authority of the head of the family over its members been entirely lost. Even among the Kikuyu, where there 'was never tribal tenure, nor was there any law which gave any particular chief or group of chiefs any power over land other than the land of their own family groups'<sup>(13)</sup>, 'the power to decide land disputes was vested in the councils of elders (Kiama) who conducted all land transactions.' 'Native law is in the main a law of persons'<sup>(12)</sup>, and it was only in exceptional circumstances that family control was absent. An instance of such a condition occurs in Kiambu, where, within comparatively recent times, according to Kikuyu tradition, land was bought by Akikuyu from members of a tribe of forest hunters, the Wando-robo. 'There are single families who bought the land' and as some of these 'have not yet increased to form a clan unit the land is still in the hands of the first purchaser, and as such he has rights of private ownership'<sup>(13)</sup>. With this exception 'the absolute ownership of land resides exclusively in the clan as a joint body, the individuals who exploit it being simply detainers by mutual consent'<sup>(14)</sup>. 'The clan recognizes as its first duty the preservation of the use of the land for its members. . . . An individual sub-owner on a *githaka* is restricted from full ownership firstly by the privileges which other members of the clan or *mbari*

enjoy on the land and which are secured by the customary sanctions of tribalism which tend to prevent individual shares from being precisely defined' (11). 'When a man has many sons he is no more alone. His interests are interwoven with those of his children and...he shares his land and all his property with them' (13). In North Kavirondo 'there is no conception of individual as apart from family ownership...no one can hold land apart from his family' (15). An Ashanti landowner has to account to counsellors, clansmen and family, as well as to the dead (10).

In Togoland 'the chief and elders are guardians of the land on behalf of the tribe' (16). Among the Akamba 'the elders of the location...will prevent a man from enclosing too large a piece of land for his private use' (17). In Samoa 'the power of the chief was tempered by the importance of the village councils, which were a real limitation on the power of the chiefs' (18).

Seigniorial authority is exercised, so far as land is concerned, mainly in prevention of disposal of the land to outsiders and in the allotment of portions of the uncultivated land within the unit to individuals for cultivation or building.

Hence under ancient native custom land was not saleable or devisable by will. A land deal could only take place by a tribal act, involving full and public discussion with the family or tribal elders and even communion with the spirits. In North Kavirondo the family land claims 'pass by inalienable right from father to son' (15). In Togoland 'sale of freehold rights over land is unknown...family land passes on the death of the head of the family to the eldest male in the male line and private property in land to the sons of the deceased' (16). Of Ashanti Rattray says, 'the further my enquiries led me, the more convinced I became that sale of land outright is a comparatively modern innovation and it was literally unknown because unthinkable in the remote past' (10). In the Hehe tribe 'land is not heritable or saleable because children will be allotted lands of their own when they grow up' (9). In pre-European Polynesia 'the notion...of out-



right cession or sale was unknown' (18). In the Kikuyu Province 'to-day the individual is unable to dispose authoritatively of the land he cultivates' (14) and even in Kiambu 'no land can be sold without the consent of at least all the senior owners'.

The unit of control of land varies from tribe to tribe. At the one extreme each individual's rights are derived directly from the chief and at the other the head of the family or in rare cases the individual is the repository of authority. Clan heads and councils of elders occupy an intermediate position. In the Enjemusi section of the Suk tribe the fields are marked out by the chief (19). The individual Hehe receives a grant of land from the headman (9). Among the Ewe 'the clan holds a piece of land' which is divided by the elders according to the requirements of the several families, and in Polynesia 'the land belonged to the family or clan', though life-occupancy by individuals was the rule. In Samoa, though 'the land was divided into areas, each of which was owned by a . . . head of a family, who subdivided it into individual plots', the family 'goes back several generations and includes the most remote ancestors', and thus is scarcely if at all distinguishable from a clan (18).

The literature on the subject does not suggest that the actual distribution of control over land has been closely studied or the definitions crystallized. There are stratifications of control, and just as the rights of an English freeholder are subject to the overriding powers of the Crown, so are the powers of a family head in a native tribe subject to those of council of elders, clan head, lesser chief and so forth. The delimitation of the various spheres of control has never been precisely studied.

Control by the head of the family is the most conspicuous, at least as regards the day-to-day land administration which most closely affects the cultivator. Among the Bantu in South Africa it has been said that there is exceedingly little evidence that the chief has ever controlled the area of land allotted to each homestead, and in North Kavirondo 'each family has exclusive rights of occupation'. In Togoland 'the land is owned collectively by

families', though 'also by individual members of a family'. In Melanesia 'there was practically ownership by the individual head of a family'.

The Kikuyu unit is the *githaka*, which represents a land claim staked out by an original founder, modified by subsequent division among his descendants. A *githaka* is presided over by the *moramati*, who is the senior member of the family group. According to Jomo Kenyatta a *moramati* cannot prevent a member of the family group from cultivating any portion of the waste lands of the *githaka*, provided there is no tabu or custom prohibiting the cultivation of that particular piece of land. His duty is to see that the land is properly used and to carry out the wishes of his dead father. He is master only of his own cultivated fields, though his consent is necessary to the admission of a tenant to the *githaka*. Amongst the Akamba only individual tenure is recognized. According to Hobley every man owns his own cultivated enclosure and can pre-empt an area of unoccupied waste<sup>(20)</sup>. Control of the unoccupied waste itself, however, apparently resides in the elders of the location, for they 'will prevent a man from enclosing too large a piece of land for his private use'<sup>(17)</sup>.

In some areas now under European control the powers of the head of the tribe or clan have been usurped in greater or less degree by the administration. In Nyasaland allotment of land by chiefs is supervised by District Officers, who endeavour to ensure that there should be as little waste as possible<sup>(21)</sup>. In the Transkeian Territories the government has assumed the position of the paramount chief; lesser chiefs have been replaced by official headmen who allot portions of vacant land subject to the approval of the District Officer. In the Hehe tribe of Tanganyika the distribution of land is made by the headman, who is presumably a government-sponsored functionary whose office has superseded that of the ancient chief.